

No. 15370

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
VS.

MULTNOMAH OPERATING COMPANY,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

MAR - 6 1957

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

CHARLES K. RICE,
Assistant Attorney General;

LEE A. JACKSON,
Attorney, Department of Justice,
Washington 25, D. C.,
For the Petitioner.

HARRY HENKE, JR.;
W. E. EVENSON,
PAUL W. STEERE,
1001 Dexter Horton Building,
Seattle 4, Washington,
For the Respondent.

The Tax Court of the United States

Docket No. 52071

MULTNOMAH OPERATING CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1954

Mar. 3—Petition received and filed. Taxpayer notified. Fee paid.

Mar. 4—Copy of petition served on General Counsel.

Mar. 29—Answer filed by General Counsel.

Mar. 29—Request for hearing in Seattle, Washington, filed by General Counsel.

Mar. 31—Notice issued placing proceeding on Seattle, Washington, calendar. Service of answer and request made.

1955

Mar. 14—Hearing set June 13, 1955, Seattle, Washington.

June 17—Hearing had before Judge Withey, on merits. Record held open 30 days to receive stipulation of facts. Briefs 9/15/55. Replies 10/17/55.

July 1—Transcript of hearing 6/17/55 filed.

July 7—Appearance of Harry Henke, Jr., as counsel filed.

Aug. 19—Stipulation of facts filed.

Aug. 19—Supplemental stipulation of facts filed.

Sept. 14—Brief filed by taxpayer. Copy served
9/16/55.

Sept. 15—Brief filed by General Counsel. Copy
served 9/16/55.

Oct. 12—Motion for extension to October 29, 1955,
to file reply brief, filed by taxpayer.
10/12/55 granted.

Oct. 27—Reply brief filed by taxpayer. Copy served.

1956

Feb. 23—Memorandum findings of fact and opinion
filed, Withey, J. Decision will be entered
under Rule 50. Copy served 3/2/56.

Mar. 21—Motion to vacate and review opinion by
full court, filed by respondent. 3/22/56
denied.

Mar. 21—Amendment to motion to vacate and re-
view opinion by full court, filed by re-
spondent. 3/22/56 denied.

June 12—Agreed computation for entry of decision,
filed.

June 13—Decision entered, Judge Withey, Divi-
sion 4.

Sept. 5—Petition for review by United States
Court of Appeals, Ninth Circuit, filed by
respondent.

Sept. 24—Proof of service filed (petitioner).

Sept. 24—Proof of service filed (Harry Henke, Jr.,
counsel).

- Oct. 4—Motion for extension of time for filing record on review and docketing petition for review to Dec. 4, 1956, filed by respondent.
- Oct. 5—Order extending time for filing record on review and docketing petition for review to 12/4/56, entered. Served 10/8/56.
- Nov. 14—Statement of points with proof of service thereon, filed.
- Nov. 14—Designation of contents of record on review, with proof of service thereon, filed.
- Nov. 14—Supplemental designation of contents of record on review, with proof of service thereon, filed.

The Tax Court of the United States

Docket No. 52071

MULTNOMAH OPERATING CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency Ap:AA:90D:HOS:EEH, dated De-

cember 15, 1953, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation, with its principal office at 7th and Pike Streets, c/o Waldorf Hotel, Seattle, Washington. The returns for the periods here involved were filed with the Collector for the District of Washington.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on December 15, 1953.

3. The taxes in controversy are income taxes for the calendar years 1948 and 1949, in the amounts shown below:

Income Taxes			
Year	Proposed Liability	Assessed	Deficiency
1948.....	\$113,581.31	\$101,775.88	\$11,805.43
1949.....	117,245.12	105,714.56	11,530.56
	<hr/>	<hr/>	<hr/>
Totals.....	\$230,826.43	\$207,490.44	\$23,335.99

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

Year 1948

(a) The Commissioner of Internal Revenue erred in failure to allow a deduction in the amount of \$30,000.00 for rent paid. The deficiency notice states that the amount of \$30,000.00 was paid to stockholders and has been disallowed as a deduction.

Year 1949

(Same as for year 1948 above)

5. The facts upon which the taxpayer relies as basis of its appeal are as follows:

(a) The Commissioner of Internal Revenue erred in failing to allow for the year 1948 and the year 1949 the amount of \$30,000.00 which was paid during each year as rental under an agreement which originally was entered into in the year 1930, and has been allowed as rental during all subsequent years. That the amount of \$30,000.00 is not paid to stockholders in proportion to their stock holdings and is clearly for rental. An agreement was entered into when assignment of the original lease was made with the Multnomah Operating Co. and has remained in effect.

Wherefore, the petitioner prays that this Honorable Court may hear and determine its appeal.

/s/ HAROLD L. SCOTT,
Counsel.

Duly Verified.

EXHIBIT A

U. S. Treasury Department
Office of the District Commissioner
Internal Revenue Service
123 U. S. Court House Bldg.
Seattle 4, Washington

December 15, 1953.

In replying refer to:

Ap:AA:90D:HOS:EEH

Multnomah Operating Co.,
c/o Waldorf Hotel,
7th and Pike Street,
Seattle, Washington.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1948, and 1949, discloses a deficiency of \$23,335.99 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Colum-

bia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Assistant Regional Commissioner, Appellate, 123 United States Court House, Seattle 4, Washington. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner of Internal
Revenue.

Enclosures:

Statement

Form 1276

Agreement Form

Ap :AA :90D :HOS :EEH

EXHIBIT A

(Copy)

Statement

Multnomah Operating Co.
 c/o Waldorf Hotel
 7th and Pike Street
 Seattle, Washington

Income Tax Liability for the Taxable Years Ended
 December 31, 1948 and December 31, 1949

Year	Liability	Assessed	Deficiency
1948	\$113,581.31	\$101,775.88	\$11,805.43
1949	117,245.12	105,714.56	11,530.56
Totals	\$230,826.43	\$207,490.44	\$23,335.99

In making this determination of your income tax liability, careful consideration has been given to the reports of examination dated July 12, 1951; to your protest dated October 29, 1951; and to the statements made at the conferences held on February 6, 1952 and December 1, 1953.

A copy of this letter and statement has been mailed to your representative, Mr. Harold L. Scott, Dexter Horton Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1948

Adjustments to Net Income

Net income as disclosed by return, Form 1120	\$267,938.63
Unallowable deductions and additional income: (a) Rental deductions.....	31,066.90
Net income as adjusted.....	\$299,005.53

Explanation of Adjustment

(a) (1)	Payments to stockholders.....	\$30,000.00
(2)	Property taxes overstated.....	1,066.90

Total adjustment\$31,066.90

(1) It is held that you are not entitled to deduct the sum of \$30,000.00 as ordinary and necessary expense of your business under section 23(a)(1)(A) of the Internal Revenue Code, which amount was paid to your stockholders and claimed as rental expense on your return.

(2) The rental deduction claimed on your return is reduced \$1,066.90, representing the overstatement of property taxes accrued by you on leased property, and claimed on the return as a deduction for rental expense.

Computation of Income Tax

Net income as adjusted.....	\$299,005.53
Less: Excess of net long-term capital gain over net short-term capital loss....	15.70
Ordinary net income.....	\$298,989.83
Less: Dividends received credit.....	102.00
Balance subject to normal tax and surtax	\$298,887.83
Normal Tax: 24% of \$298,887.83.....	\$ 71,733.08
Surtax: 14% of \$298,887.83.....	41,844.30
Partial tax	\$113,577.38
Plus: 25% of \$15.70.....	3.93
Income tax liability.....	\$113,581.31
Income tax assessed: Original Account No. 4100797	101,775.88
Deficiency in income tax.....	\$ 11,805.43

Taxable Year Ended December 31, 1949

Adjustments to Net Income

Net income as disclosed by return, Form 1120	\$278,196.19
Unallowable deductions and additional income: (a) Rental deduction.....	30,343.60
Net income as adjusted.....	<u>\$308,539.79</u>

Explanation of Adjustment

(a) (1) Payments to stockholders.....	\$30,000.00
(2) Property taxes overstated.....	343.60

Total adjustment\$30,343.60

(1) It is held that you are not entitled to deduct the sum of \$30,000.00 as ordinary and necessary expense of your business under section 23(a)(1)(A) of the Internal Revenue Code, which amount was paid to your stockholders and claimed as rental expense on your return.

(2) The rental deduction claimed on your return is reduced \$343.60, representing the overstatement of property taxes accrued by you on leased property, and claimed on the return as a deduction for rental expenses.

Computation of Income Tax

Net Income as adjusted.....	\$308,539.79
Normal-tax and surtax net income.....	\$308,539.79
Normal tax: 24% of \$308,539.79.....	\$ 74,049.55
Surtax: 14% of \$308,539.79.....	43,195.57
Income tax liability.....	<u>\$117,245.12</u>
Income tax assessed: Original, Account No. 4101083	105,714.56
Deficiency in income tax.....	<u>\$ 11,530.56</u>

Received and Filed March 3, 1954, T.C.U.S.

Served March 4, 1954.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. (a). Denies that in determining the deficiencies asserted in the statutory notice of deficiencies herein the respondent committed any error, and specifically denies the allegations of error set forth in subparagraph (a) of paragraph 4 of the petition.

5. (a). Denies the allegations contained in subparagraph (a) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of deficiencies be approved.

/s/ DANIEL A. TAYLOR, W.H.P.
Chief Counsel,
Internal Revenue Service.

Filed March 29, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

Pursuant to Permission of the Court and oral stipulation made and entered into by and between counsel for petitioner and respondent in open Court upon June 17, 1955, the following facts are hereby stipulated and entered into the record of this proceeding.

1. The total stock of petitioner outstanding at all times was 250 shares of common stock. These shares were held as follows on the following dates:

Multnomah Operating Co.

Shareholders July 1, 1931; January, 1944-48-49.

[This list of Shareholders is set out in full in Memorandum Findings of Fact, pages 25-39 and is not duplicated here.]

Multnomah Operating Co.

Members of Voting Trust from 5-1-40 to 5-1-50

(Not renewed)

[This list of Members of Voting Trust is set out in full in Memorandum Findings of Fact, pages 25-39, and is not duplicated here.]

This voting provided that the stock would be voted by S. W. Thurston, or if he should die or become incapacitated, unable or unwilling to vote said stock, said stock would be voted by F. A. Dupar,

and if they both died, became incapacitated, unable or unwilling to vote said stock, then said stock would be voted by F. M. Kenney.

2. The total outstanding stock of the Maltby-Thurston Hotels, Inc., was as shown below in the following tabulations. These shares were held as follows on the following dates:

Maltby-Thurston Hotels, Inc.

Principal Stockholders

[This list of Principal Stockholders is set out in full in Memorandum Findings of Fact, pages 25-39, and is not duplicated here.]

Stock in Voting Trust

[This list of Stock in Voting Trust is set out in full in Memorandum Findings of Fact, pages 25-39, and is not duplicated here.]

3. The total outstanding stock of the Western Hotels, Inc., was at all times as shown in the following tabulation. These shares were held as follows on the following dates:

Western Hotels, Inc.

Shareholders July 1, 1931; January, 1944-48-49

[This list of Shareholders is set out in full in Memorandum Findings of Fact, pages 25-39, and is not duplicated here.]

Capital Stock of Western Hotels, Inc., reduced from 10,000 shares to 100 shares June 20, 1934.

4. The total outstanding stock of the Pacific Coast Investment Co. was at all times 600,000 shares of common stock. These shares were held as follows on the following dates:

Pacific Coast Investment Co.

Stockholders List

July 1, 1931

[This list of Stockholders is set out in full in Memorandum Findings of Fact, pages 25-39, and is not duplicated here.]

Pacific Coast Investment Co.

Stockholders List

January 1, 1944

[This list of Stockholders is set out in full in Memorandum Findings of Fact, pages 25-39, and is not duplicated here.]

Pacific Coast Investment Co.

Stockholders List

January 1, 1948

[This list of Stockholders is set out in full in Memorandum Findings of Fact, pages 25-39, and is not duplicated here.]

Pacific Coast Investment Co.

Stockholders List

January 1, 1949

[This list of Stockholders is set out in full in Memorandum Findings of Fact, pages 25-39, and is not duplicated here.]

5. With reference to the Maltby-Thurston voting trust, the voting trustees were H. E. Maltby, S. W. Thurston, T. E. Himmelman, F. A. Dupar and F. M. Kenney. The number of shares subject to this trust held by the trustors and the beneficial owners of the stock is as set forth in Paragraph 2. Paragraphs 8-11 below set forth the information as to whether any of the beneficial owners of the stock subject to this voting trust were officers, employees or directors of either Maltby - Thurston Hotels, Inc.; Multnomah Operating Company, Western Hotels, Inc., or Pacific Coast Investment Company.

6. It is stipulated that no money or property was paid or given by Maltby-Thurston Hotels, Inc., for the lease, an extract of which has been admitted in evidence in this proceeding as Exhibit 1, except the payments required to be made by the terms of said lease as shown in said Exhibit 1.

7. It is stipulated that the rentals paid to Hauser Securities Company by Multnomah Operating Company are set forth below, with the exception of those years for which there is no information available:

Schedule of Rent Paid Hauser Securities Company
by Multnomah Operating Company
(Detail of rent for preceding years not available)

	Base	Percentage	Total
39 per mo. \$5,628.65.....	\$ 67,543.80	\$ 7,057.53	\$ 74,601.33
40	67,543.80	7,572.99	75,116.79
41	67,543.80	11,256.84	78,800.64
42	67,543.80	34,602.78	102,146.58
43	67,543.80	68,835.13	136,378.93

	Base	Percentage	Total
1944 per mo. 2/1/44 \$8,500.	\$ 99,128.65	\$ 45,806.19	\$114,934.8
1945	102,000.00	50,083.99	152,083.9
1946	102,000.00	66,424.03	168,424.0
1947	102,000.00	97,322.87	199,322.8
1948	102,000.00	115,604.53	217,604.5
1949	102,000.00	122,847.57	224,847.5
1950	102,000.00	132,845.74	234,845.7
1951	102,000.00	152,252.54	254,252.5
1952	102,000.00	178,356.00	280,356.0
1953	102,000.00	209,245.71	311,245.7
1954	102,000.00	212,974.43	314,974.4

8. The officers and directors of Maltby-Thurston Hotels Inc., during the period 1944 through 1949, were as follows their annual compensation being set forth behind their respective names:

1944 Directors	Officers	Annual Compensation
S. W. Thurston	S. W. Thurston, Pres.	Non
F. A. Dupar	F. A. Dupar, Vice Pres.	Non
T. E. Himmelman	T. E. Himmelman, Vice Pres.	Non
H. W. Casson	H. E. Maltby, Secretary-Treas.	Non
F. M. Kenney	H. W. Casson, Asst. Sec.-Treas.	Non
Chas. T. Donworth		
H. E. Maltby		

1945 Directors	Officers	Annual Compensation
S. W. Thurston	S. W. Thurston, Pres.	Non
F. A. Dupar	F. A. Dupar, Vice Pres.	Non
T. E. Himmelman	T. E. Himmelman, Vice Pres.	Non
H. W. Casson	H. E. Maltby, Secretary-Treas.	Non
F. M. Kenney	H. W. Casson, Asst. Sec.-Treas.	Non
Chas. T. Donworth		
H. E. Maltby		

1946 Directors	Officers	Annual Compensation
S. W. Thurston	S. W. Thurston, Pres.	Non
F. A. Dupar	F. A. Dupar, Vice Pres.	Non
T. E. Himmelman	T. E. Himmelman, Vice Pres.	Non
H. E. Maltby	H. E. Maltby, Sec.-Treas.	Non
Chas. T. Donworth	F. M. Kenney, Asst. Sec.-Treas.	Non

1947 Directors	Officers	Annual Compensations
S. W. Thurston	S. W. Thurston, Pres.	None
F. A. Dupar	F. A. Dupar, Vice Pres.	None
T. E. Himmelman	T. E. Himmelman, Vice Pres.	None
H. E. Maltby	H. E. Maltby, Sec.-Treas.	None
Chas. T. Donworth	F. M. Kenney, Asst. Sec.-Treas.	None

1948 Directors	Officers	Annual Compensations
S. W. Thurston	S. W. Thurston, Pres.	None
F. A. Dupar	F. A. Dupar, Vice Pres.	None
T. E. Himmelman	T. E. Himmelman, Vice Pres.	None
H. E. Maltby	H. E. Maltby, Sec.-Treas.	None
Chas. T. Donworth	F. M. Kenney, Asst. Sec.-Treas.	None

1949 Directors	Officers	Annual Compensations
S. W. Thurston	S. W. Thurston, Pres.	None
H. E. Maltby	F. A. Dupar, Vice Pres. and Asst. Treas.	None
F. A. Dupar	T. E. Himmelman, Vice Pres.	None
T. E. Himmelman	H. E. Maltby, Sec.-Treas.	None
Dewey W. Metzdorf	F. A. Weston, Asst. Sec. Treas.	None
Chas. T. Donworth		

9. The officers and directors of the petitioner, Multnomah Operating Company, for the years 1931 and 1944, through 1949, inclusive, are as follows, their compensations being set forth opposite their respective names:

1931 Directors	Officers	Annual Compensations
S. W. Thurston	S. W. Thurston, Pres.	\$ 4,500.00
John R. Latourette	E. V. Hauser, Vice Pres.	
F. A. Dupar	F. A. Dupar, Secretary.....	2,250.00
Peter G. Schmidt	Peter G. Schmidt, Treasurer.....	2,250.00
H. E. Maltby	H. E. Maltby, Asst. Sec.	
Earl V. Hauser		

1944 Directors	Officers	Annual Compensations
S. W. Thurston	S. W. Thurston, Pres.	\$10,200.00
F. M. Kenney	F. M. Kenney, Vice Pres.	4,500.00
F. A. Dupar	Earl McInnis, Vice Pres.	
	F. A. Dupar, Secretary.....	4,500.00
	H. E. Maltby, Treasurer.....	
	H. W. Casson, Asst. Treas.	

1945 Directors	Officers	Annual Compensations
S. W. Thurston	S. W. Thurston, Pres.	\$10,200.00
F. M. Kenney	F. M. Kenney, Vice Pres.	4,500.00
F. A. Dupar	Earl McInnis, Vice Pres.	
	F. A. Dupar, Secretary.....	4,500.00
	H. E. Maltby, Treasurer.....	
	H. W. Casson, Asst. Treas.	

1946 Directors	Officers	Annual Compensations
S. W. Thurston	S. W. Thurston, Pres.	\$10,200.00
F. M. Kenney	F. M. Kenney, Vice Pres.	4,500.00
F. A. Dupar	Earl McInnis, Vice Pres.	
	F. A. Dupar, Secretary.....	4,500.00
	H. E. Maltby, Treasurer.....	
	H. W. Casson, Asst. Treas.	

1947 Directors	Officers	Annual Compensations
S. W. Thurston	S. W. Thurston, Pres.	\$10,200.00
F. M. Kenney	F. M. Kenney, Vice Pres.	4,500.00
F. A. Dupar	Earl McInnis, Vice Pres.	
	F. A. Dupar, Secretary.....	4,500.00
	H. E. Maltby, Treasurer.....	
	F. A. Weston, Asst. Sec.-Treasurer.....	

1948 Directors	Officers	Annual Compensations
S. W. Thurston	S. W. Thurston, Pres.	\$10,200.00
F. M. Kenney	F. M. Kenney, Vice Pres.	4,500.00
F. A. Dupar	Gordon Bass, Vice Pres.	
	F. A. Dupar, Secretary.....	4,500.00
	H. E. Maltby, Treasurer.....	
	F. A. Weston, Asst. Treas.	

1949 Directors	Officers	Annual Compensations
S. W. Thurston	S. W. Thurston, Pres.	\$10,200.00
F. M. Kenney	F. M. Kenney, Vice Pres.	4,500.00
F. A. Dupar	Gordon Bass, Vice Pres.	15,318.72
	F. A. Dupar, Secretary.....	4,500.00
	H. E. Maltby, Treasurer.....	
	F. A. Weston, Asst. Treas.	1,500.00

10. The officers and directors of Western Hotels, Inc., for the years 1944 through 1949, inclusive, are as follows, their annual compensations being set forth behind their respective names:

1944 Directors	Officers	Annual Compensations
W. W. Thurston	S. W. Thurston, Pres.	\$26,250.00
F. M. Kenney	F. M. Kenney, Vice Pres.	14,430.00
F. A. Dupar	T. E. Himmelman, Vice Pres.	4,350.00
	F. A. Dupar, Secretary.....	15,100.00
	H. E. Maltby, Treasurer.....	11,650.00
	H. W. Casson, Asst. Sec.-Treas.	

1945 Directors	Officers	Annual Compensations
W. W. Thurston	S. W. Thurston, Pres.	\$29,700.00
F. M. Kenney	F. M. Kenney, Vice Pres.	15,230.00
F. A. Dupar	T. E. Himmelman, Vice Pres.	4,500.00
	F. A. Dupar, Secretary.....	17,150.00
	H. E. Maltby, Treasurer.....	12,200.00
	H. W. Casson, Asst. Sec.-Treas.	

1946 Directors	Officers	Annual Compensations
W. W. Thurston	S. W. Thurston, Pres.	\$31,335.50
F. M. Kenney	F. M. Kenney, Vice Pres.	15,749.00
F. A. Dupar	T. E. Himmelman, Vice Pres.	4,500.00
	F. A. Dupar, Secretary.....	18,067.75
	H. E. Maltby, Treasurer.....	12,677.75
	H. W. Casson, Asst. Sec.-Treas.	

1947 Directors	Officers	Annual Compensations
W. W. Thurston	S. W. Thurston, Pres.	\$28,400.00
F. M. Kenney	F. M. Kenney, Vice Pres.	16,180.00
F. A. Dupar	T. E. Himmelman, Vice Pres.	4,500.00
	E. E. Carlson, Vice Pres.	9,250.00
	C. W. Hunlock, Vice Pres.	3,600.00
	F. A. Dupar, Secretary.....	16,750.00
	H. E. Maltby, Treasurer.....	11,400.00

1948 Directors	Officers	Annual Compensation
S. W. Thurston	S. W. Thurston, Pres.	\$28,400
F. M. Kenney	F. M. Kenney, Vice Pres.	14,680
F. A. Dupar	T. E. Himmelman, Vice Pres.	4,500
	Dewey W. Metzdorf, Vice Pres.	
	C. W. Hunlock, Vice Pres.	3,600
	E. E. Carlson, Vice Pres.	9,500
	F. A. Dupar, Secretary.....	17,250
	H. E. Maltby, Treasurer.....	10,400
	F. A. Weston, Asst. Sec.-Treas.	

1949 Directors	Officers	Annual Compensation
S. W. Thurston	S. W. Thurston, Pres.	\$35,520
F. M. Kenney	F. M. Kenney, Vice Pres.	7,800
F. A. Dupar	T. H. Himmelman, Vice Pres.	16,040
	Dewey W. Metzdorf, Vice Pres.	10,560
	C. W. Hunlock, Vice Pres.	14,840
	E. E. Carlson, Vice Pres.	19,560
	F. A. Dupar, Secretary.....	27,280
	H. E. Maltby, Treasurer.....	9,000

11. The officers and directors for the Pacific Coast Investment Company, from 1944 through 1949, inclusive, are as follows, their annual compensations being set forth behind their respective names:

1944 Directors	Officers	Annual Compensation
F. M. Kenney	F. M. Kenney, Pres.	} (Records not available)
Peter G. Schmidt	A. C. C. Gamer, Vice Pres.	
A. C. C. Gamer	F. W. Schmidt, Secretary.....	
A. D. Schmidt		
F. W. Schmidt		

1945 Directors	Officers	Annual Compensation
F. M. Kenney	F. M. Kenney, Pres.	} (Records not available)
Peter G. Schmidt	A. C. C. Gamer, Vice Pres.	
A. C. C. Gamer	F. W. Schmidt, Secretary.....	
A. D. Schmidt		
F. W. Schmidt		

1946 Directors

F. M. Kenney
Peter G. Schmidt
A. C. C. Gamer
A. D. Schmidt
F. W. Schmidt

Officers

F. M. Kenney, Pres.	} (Records not available)
A. C. C. Gamer, Vice Pres.	
F. W. Schmidt, Secretary.....	

Annual
Compensations

1947 Directors

F. M. Kenney
Peter G. Schmidt
A. C. C. Gamer
A. D. Schmidt, Jr.
F. W. Schmidt

Officers

F. M. Kenney, Pres.	} (Records not available)
A. C. C. Gamer, Vice Pres.	
F. W. Schmidt.....	

Annual
Compensations

1948 Directors

F. M. Kenney
F. A. Dupar
S. W. Thurston

Officers

F. M. Kenney, Pres.	None
F. A. Dupar, Vice Pres.	None
S. W. Thurston, Sec.-Treas.	None
F. A. Weston, Asst. Sec.-Treas.	None

Annual
Compensations

1949 Directors

F. M. Kenney
F. A. Dupar
S. W. Thurston

Officers

F. M. Kenney, President.....	None
F. A. Dupar, Vice President.....	None
S. W. Thurston, Sec'y-Treas.	None
F. A. Weston, Asst. Sec.-Treas.	None

Annual
Compensations

/s/ HARRY HENKE, JR.,
Counsel for Petitioner.

/s/ JOHN POTTS BARNES, R.E.M.,
Chief Counsel, Internal Revenue Service, Counsel for
Respondent.

Received July 18, 1955.

Filed August 19, 1955, T.C.U.S.

[Title of Tax Court and Cause.]

SUPPLEMENTAL STIPULATION
OF FACTS

At the request of counsel for respondent and pursuant to agreement before counsel for both parties, the following facts are hereby stipulated and entered into the record of this proceeding in order to supplement the Stipulation of Facts in this proceeding:

1. Adeline G. Metzdorf, the beneficial owner of one thousand shares of the stock of Maltby-Thurston Hotels, Inc., a Washington corporation, held in a voting trust, is the wife of Dewey W. Metzdorf.

2. The said Adeline G. Metzdorf is not an employee, officer or director of either Maltby-Thurston Hotels, Inc., Multnomah Operating Co., Western Hotels, Inc., or Pacific Coast Investment Co.

3. The said Adeline G. Metzdorf is not related to any other individual holding stock in the Maltby-Thurston Hotels, Inc., voting trust.

Dated this day of August, 1955.

/s/ HARRY HENKE, JR.,
Counsel for Petitioner.

/s/ JOHN POTTS BARNES, R.E.M.
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

Filed August 19, 1955, T.C.U.S.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT
AND OPINION

Withey, Judge:

The Commissioner has determined a deficiency against the petitioner, Multnomah Operating Co., in the amount of \$11,805.43 for the year 1948 and \$11,530.56 for the year 1949.

The sole issue for our determination is whether or not certain payments made in each year by petitioner constituted deductible business expenses under section 23(a)(1)(A) of the Internal Revenue Code of 1939.

Findings of Fact

Stipulated facts are so found.

Petitioner, Multnomah Operating Co., hereinafter referred to at times as Multnomah, is a corporation with its principal office and place of business in Seattle, Washington. It filed income tax returns for the calendar years 1948 and 1949 with the collector for the district of Washington.

Petitioner was incorporated in 1931 with a paid-in capital of \$1,000 which was represented by 250 shares of common stock. On the following dates, these shares were held as listed:

Shareholder	July 1 1931	January 1944	January 1948	January 1949
A. P. Bassett.....	15	15	15	15
A. D. Belanger	15	—	—	—
F. A. Dupar & Peoples Natl. Bank, Coexecutors under Will of A. P. Bassett.....	—	—	—	5
Frank A. Dupar.....	17	1½	1½	101½
H. E. Dupar.....	15	—	—	—
H. E. Dupar and F. A. Dupar, Trustees	—	15	15	—
Eric V. Hauser.....	1	—	—	—
F. M. Kenney—qualifying share Pacific Coast Investment Co.....	—	1	1	1
John R. Latourette.....	1	—	—	—
Maltby-Thurston Hotels, Inc.....	123	—	—	—
Peter G. Schmidt, Trustee.....	62	—	—	—
S. W. Thurston—qualifying share Maltby-Thurston Hotels, Inc.....	1	1	1	1
Voting Trust—in existence from May 1, 1940, to April 30, 1950....	—	217½	217½	217½
Total	250	250	250	250
	==	==	==	==

During the period 1944 through 1949 voting control of petitioner rested in the members of a voting trust, the identity and stock contributions to the trust of such members being as follows:

Multnomah Operating Co.

Members of Voting Trust from May 1, 1940, to May 1, 1950

	1944	1948	1949
F. A. Dupar.....	17	17	17
H. E. Dupar.....	15	—	—
Maltby-Thurston Hotels, Inc.....	124	124	124
Pacific Coast Investment Co.....	61½	61½	61½
Seattle First National Bank, Trustee under Will of H. E. Dupar, deceased	—	15	15
Total	217½	217½	217½
	==	==	==

The total outstanding stock of the Maltby-Thurston Hotels, Inc., hereinafter referred to as Maltby, was as shown below in the following tabulations. These shares were held as follows on the following dates:

Maltby-Thurston Hotels, Inc.

Principal Stockholders	Common Stock	July 1, 1931 Class A Stock	Preferred Stock
Troy E. Himmelman.....	1,991 $\frac{2}{3}$	32	791 $\frac{1}{2}$
F. M. Kenney.....	1	—	—
Harold Emery Maltby.....	6,569	1,260	1961 $\frac{1}{4}$
Pacific Coast Investment Company	—	—	11 $\frac{1}{4}$
S. W. Thurston.....	10,153 $\frac{1}{4}$	120	1881 $\frac{1}{2}$
Subtotal	18,714 11/12	1,412	4651 $\frac{1}{2}$
Frank D. or Blanche Bruce....	1,459	150	29
H. E. Lutz.....	2,042	70	175
Earl McInnes	1,566 $\frac{2}{3}$	35	89
Hy D. Miller.....	—	—	150
Total	23,782 7/12	1,667	9081 $\frac{1}{2}$
Stock outstanding on dates indicated above	31,298 $\frac{3}{4}$	4,1861 $\frac{1}{2}$	4,756

	Jan. 1, 1944 Common Stock	Jan. 1, 1948 Common Stock	Jan. 1, 1949 Common Stock
Frank A. Dupar.....	0	856	1,178
T. E. Himmelman.....	775	797	836
F. M. Kenney.....	45	70	70
Harold Emery Maltby.....	100	525	525
Dewey W. Metzdorf.....	—	172	172
Pacific Coast Investment Company	5111 $\frac{1}{4}$	5111 $\frac{1}{4}$	5111 $\frac{1}{4}$
S. W. Thurston	261 $\frac{1}{4}$	184 $\frac{3}{4}$	300 $\frac{3}{4}$
Voting Trust	15,9951 $\frac{1}{2}$	15,112	15,112
Subtotal	17,453	18,228	18,705

	Jan. 1, 1944 Common Stock	Jan. 1, 1948 Common Stock	Jan. 1, 1949 Common Stock
Frank D or			
Blanche Bruce	1,569 $\frac{1}{4}$	1,569 $\frac{1}{4}$	1,569 $\frac{1}{4}$
H. E. Lutz.....	1,689 $\frac{1}{4}$	1,689 $\frac{1}{4}$	1,689 $\frac{1}{4}$
Earl McInnes	668 $\frac{2}{3}$	668 $\frac{2}{3}$	668 $\frac{2}{3}$
Hy D. Miller.....	344	—	—
Total	21,724 $\frac{1}{6}$	22,155 $\frac{1}{6}$	22,632 $\frac{1}{6}$
Stock outstanding on dates indicated above	27,528	30,323	30,401

Maltby-Thurston Hotels, Inc.

Stock in Voting Trust

	Jan. 1, 1944	Jan. 1948	Jan. 1949
Frank A. Dupar.....	267	267	267
T. E. Himmelman.....	1,737	1,737	1,737
F. M. Kenney.....	108	108	108
H. E. Maltby.....	5,725 $\frac{1}{4}$	5,000	5,000
Adeline G. Metzdorf.....	—	1,000	1,000
Dewey W. Metzdorf.....	—	828	828
S. W. Thurston.....	8,158 $\frac{1}{4}$	6,172	6,172
Total	15,995 $\frac{1}{2}$	15,112	15,112

Western Hotels, Inc., hereinafter referred to as Western, was incorporated about 1930 as a hotel service organization rendering general services to all hotels for a consideration. It represented an effort on the part of Maltby, Pacific Coast Investment Co., hereinafter referred to for convenience as PCI, and Frank A. Dupar who had previously been competitors to thereafter cease competition and act in concert to their mutual benefit in the hotel business. Western's total capital stock during 1931 consisted of 5,630 shares which was reduced to 100 shares in 1934. Its stock was held as follows on the indicated pertinent dates:

Western Hotels, Inc.

Shareholders	July 1 1931	January 1944	January 1948	January 1949
A. D. Belanger.....	1	—	—	—
Byron Hotel Co.	519	—	—	—
Capital Hotel Co.	558	—	—	—
H. W. Casson.....	1	—	—	—
Chas. T. Donworth.....	1	—	—	—
Frank A. Dupar.....	1	25	25	25
Elman Hotel Co.	299	—	—	—
Exchange Investment Co.	179	—	—	—
F. M. Kenney.....	1	—	—	—
H. E. Maltby.....	1	—	—	—
Maltby-Thurston Hotels, Inc.	2,886	50	50	50
Hy D. Miller.....	1	—	—	—
Carl E. Morek.....	1	—	—	—
Morek Hotel Co.	299	—	—	—
John C. Pierce.....	1	—	—	—
Thad S. Pierce.....	1	—	—	—
Adolph D. Schmidt.....	1	—	—	—
Peter G. Schmidt.....	1	—	—	—
S. W. Thurston.....	1	—	—	—
Washington Hotel Co.	499	—	—	—
West Coast Hotel Co.	378	—	—	—
Pacific Coast Investment Co.	—	25	25	25
Total	5,630	100	100	100

The total outstanding stock of PCI was at all times 600,000 shares which were held on July 1, 1931, as follows:

Pacific Coast Investment Co.

July 1, 1931

Stockholders	Number of shares held
J. Duttonhoefer	1,008
W. J. Foster	540
W. B. Gaffney, Estate	2,400

A. C. C. Gamer	220
Henry Schupp	5,040
Larabie Stock Co.	78,246
Julia W. Larabie	9,601
C. Ted Larabie	2,400
Mary Ann Larabie	2,400
Lucien Larabie	2,400
Elizabeth Larabie	2,400
Sue M. Larabie	2,400
Fred Stocking	1,231
P. M. Troy	1,231
Sams V. Peters	270
Schmidt Estate, Inc.	348,506
Peter G. Schmidt	14,401
Mrs. Peter G. Schmidt	500
Frank T. Schmidt	7,200
Frederick W. Schmidt	905
Joe R. Speckart	37,472
J. H. Rohrbeck	1
F. M. Kenney	6,001
Toba Harris	6,000
N. P. Faris	135
Emma M. Foreman	12,906
Lena R. Gamer	25,812
C. E. Larabie	1,200
Mrs. R. D. Larabie	3,600
Emmy Mailand	5,334
U. S. National Bank of Portland, Trustee ..	5,334
Dorothy L. Gamer	6,453
Leland S. Gamer	6,453

Total number of shares issued 600,000

on January 1, 1944, as follows:

Pacific Coast Investment Co.

January 1, 1944

Stockholder	Number of Shares Held
Dr. Marie D. Equi	5,334
Blanche Gaffney	1,200
F. M. Kenney	92,371
Frank J. Kenney	2,500
Janet Lee	2,500
Helen Malloy	2,500
Grace Mallory	2,500
Emma M. Foreman	25,812
W. J. Foster	540
Olive B. Gaffney	1,200
A. C. C. Gamer	12,906
Dorothy L. Gamer	6,573
Leland L. Gamer	6,553
Irene Hannah	6,000
F. M. Kenney, Peter G. Schmidt, Trustees for Paula Speckart	37,472
Mrs. R. D. Larabie	3,600
Caroline Schmidt Maury	4,000
J. C. Sams	270
Phillipine S. Rettenmeyer	62,175
Adolph Schmidt	42,175
Clara M. Schmidt, Trustee	20,000
Clara M. Schmidt, Personal	500
Louise W. Schmidt	62,179
Peter G. Schmidt, Frank T. Schmidt, J. B. Peyton, Trustees for Elsa Schmidt	63,080

Stockholder	Number of Shares Held
Peter G. Schmidt, Personal	42,175
Frank T. Schmidt, Trustee	70,383
Adolph Schmidt, Jr.	4,000
Robert A. Schmidt	4,000
Truman L. Schmidt	4,000
Philip H. Schmidt	4,000
Katherine Schupp	5,040
Alma Stocking	1,231
Smith Troy	1,231
<hr/>	
Total number of shares issued	600,000
<hr/> <hr/>	

on January 1, 1948, as follows:

Pacific Cost Investment Co.

January 1, 1948

Stockholder	Number of Shares Held
Maltby-Thurston Hotels, Inc	471,983
F. M. Kenney	471,983
Frank J. Kenney	4,500
Irene Kenney	2,000
Janet Lee	4,500
Dr. Marie D. Equi	5,334
Helen A. Malloy	4,600
Grace Mallory	4,500
New Washington Hotel Co.	19,112
Olive B. Gaffney	1,200
<hr/>	
Total number of shares issued	600,000
<hr/> <hr/>	

and on January 1, 1949, as follows:

Pacific Coast Investment Co.

January 1, 1949

Stockholder	Number of Shares Held
Maltby-Thurston Hotels, Inc.	433,522
New Washington Hotel Co.	58,773
Dr. Marie Equi	5,334
F. M. Kenney	81,371
Frank J. Kenney	4,500
Janet Lee	4,500
Irene Kenney	2,000
Helen A. Malloy	4,600
Mark A. Malloy	900
Grace Mallory	4,500
	<hr/>
Total stock issued	600,000
	<hr/> <hr/>

The officers and directors of Maltby during the period 1944 through 1949 were as follows:

1944, 1945

Directors:

S. W. Thurston,
F. A. Dupar,
T. E. Himmelman,
H. E. Maltby,
H. W. Casson,
Chas. T. Donworth,
F. M. Kenney.

Officers:

S. W. Thurston, Pres.;
F. A. Dupar, Vice Pres.;
T. E. Himmelman, Vice Pres.;
H. E. Maltby, Sec.-Treas.;
H. W. Casson, Asst. Sec.-Treas.

1946, 1947, 1948

Directors:

S. W. Thurston,
F. A. Dupar,
T. E. Himmelman,
H. E. Maltby,
Chas. T. Donworth.

Officers:

S. W. Thurston, Pres.;
F. A. Dupar, Vice Pres.;
T. E. Himmelman, Vice Pres.;
H. E. Maltby, Sec.-Treas.;
F. M. Kenney, Asst. Sec.-Treas.

1949

Directors:

S. W. Thurston,
F. A. Dupar,
T. E. Himmelman,
H. E. Maltby,
Chas. T. Donworth,
Dewey W. Metzdorf.

Officers:

S. W. Thurston, Pres.;
F. A. Dupar, Vice Pres. and Asst. Treas.;

T. E. Himmelman, Vice Pres. ;
H. E. Maltby, Sec.-Treas. ;
F. A. Weston, Asst. Sec.-Treas.

The officers and directors of the petitioner, Multnomah, for the years 1931 and 1944 through 1949, inclusive, were as follows:

1931

Directors:

S. W. Thurston,
Earl V. Hauser,
F. A. Dupar,
Peter G. Schmidt,
H. E. Maltby,
John R. Latourette.

Officers:

S. W. Thurston, Pres. ;
E. V. Hauser, Vice Pres. ;
F. A. Dupar, Secretary ;
Peter G. Schmidt, Treasurer ;
H. E. Maltby, Asst. Sec.

1944, 1945, 1946

Directors:

S. W. Thurston,
F. M. Kenney,
F. A. Dupar.

Officers:

S. W. Thurston, Pres. ;
F. M. Kenney, Vice Pres. ;
Earl McInnis, Vice Pres. ;

F. A. Dupar, Secretary;
H. E. Maltby, Treasurer;
H. W. Casson, Asst. Treas.

1947

Directors:

S. W. Thurston,
F. M. Kenney,
F. A. Dupar.

Officers:

S. W. Thurston, Pres.;
F. M. Kenney, Vice Pres.;
Earl McInnis, Vice Pres.;
F. A. Dupar, Secretary;
H. E. Maltby, Treasurer;
F. A. Weston, Asst. Sec.-Treas.

1948, 1949

Directors:

S. W. Thurston,
F. M. Kenney,
F. A. Dupar.

Officers:

S. W. Thurston, Pres.;
F. M. Kenney, Vice Pres.;
Gordon Bass, Vice Pres.;
F. A. Dupar, Secretary;
H. E. Maltby, Treasurer;
F. A. Weston, Asst. Treas.

The officers and directors of Western for the years 1944 through 1949, inclusive, were as follows:

1944, 1945, 1946

Directors:

S. W. Thurston,
F. M. Kenney,
F. A. Dupar.

Officers:

S. W. Thurston, Pres.;
F. M. Kenney, Vice Pres.;
T. E. Himmelman, Vice Pres.;
F. A. Dupar, Secretary;
H. E. Maltby, Treasurer;
H. W. Casson, Asst. Sec.-Treas.

1947

Directors:

S. W. Thurston,
F. M. Kenney,
F. A. Dupar.

Officers:

S. W. Thurston, Pres.;
F. M. Kenney, Vice Pres.;
T. E. Himmelman, Vice Pres.;
E. E. Carlson, Vice Pres.;
C. W. Hunlock, Vice Pres.;
F. A. Dupar, Secretary;
H. E. Maltby, Treasurer.

1948

Directors:

S. W. Thurston,
F. M. Kenney,
F. A. Dupar.

Officers:

S. W. Thurston, Pres.;
F. M. Kenney, Vice Pres.;
T. E. Himmelman, Vice Pres.;
Dewey W. Metzdorf, Vice Pres.;
C. W. Hunlock, Vice Pres.;
E. E. Carlson, Vice Pres.;
F. A. Dupar, Secretary;
H. E. Maltby, Treasurer;
F. A. Weston, Asst. Sec.-Treas.

1949

Directors:

S. W. Thurston,
F. M. Kenney,
F. A. Dupar.

Officers:

S. W. Thurston, Pres.;
F. M. Kenney, Vice Pres.;
T. H. [sic] Himmelman, Vice Pres.;
Dewey W. Metzdorf, Vice Pres.;
C. W. Hunlock, Vice Pres.;
E. E. Carlson, Vice Pres.;
F. A. Dupar, Secretary;
H. E. Maltby, Treasurer.

The officers and directors for PCI from 1944 through 1949, inclusive, were as follows:

1944, 1945, 1946

Directors:

F. M. Kenney,
Peter G. Schmidt,
A. C. C. Gamer,
A. D. Schmidt,
F. W. Schmidt.

Officers:

F. M. Kenney, Pres.;
A. C. C. Gamer, Vice Pres.;
F. W. Schmidt, Secretary.

1947

Directors:

F. M. Kenney,
Peter G. Schmidt,
A. C. C. Gamer,
A. D. Schmidt, Jr.,
F. W. Schmidt.

Officers:

F. M. Kenney, Pres.;
A. C. C. Gamer, Vice Pres.;
F. W. Schmidt.

1948, 1949

Directors:

F. M. Kenney,
F. A. Dupar,
S. W. Thurston.

Officers:

F. M. Kenney, Pres.;

F. A. Dupar, Vice Pres.;

S. W. Thurston, Sec.-Treas.;

F. A. Weston, Asst. Sec.-Treas.

The Multnomah voting trust stock was votable by S. W. Thurston, Frank Dupar and F. M. Kenney on behalf of PCI in that order conditioned upon whether he who had the primary right so to do died, became incapacitated, unwilling or unable to vote the stock. The Maltby voting trustees in 1948 and 1949 were H. E. Maltby, S. W. Thurston, T. E. Himmelman, Frank A. Dupar and F. M. Kenney.

By a lease, dated June 17, 1931, negotiated at arm's length, Hauser Securities Company leased the Multnomah Hotel in Portland, Oregon, to Maltby for a term of 15 years commencing July 1, 1931, and ending July 1, 1946. The lease rental consisted of a minimum fixed monthly rental of \$7,000 per month and a designated percentage of gross revenue. No bonus or consideration other than this rental was paid to the lessor.

The lease, inter alia, provided:

This lease to a large extent is based upon the personnel of the present officers of said Lessee and their ability to conduct and operate a first-class hotel and by reason thereof Lessee covenants and agrees not to assign this lease nor sublet nor underlet nor permit any other person or persons to

occupy said premises other than the employees and patrons of said Lessee without the consent of said Lessor being first obtained in writing. * * * (Provided further that it is understood and agreed that the within Lessee contemplates the forming of an Oregon corporation to whom the within lease may be assigned by it, the majority of the personnel of which will be the same as that of the within named Lessee and/or Western Hotels, Inc., and Lessor consents to the within named Lessee assigning the within lease to said corporation to be duly formed providing that said assignment shall be subject to all of the terms, covenants and conditions of the within lease and with the consent that the demised premises are only to be used for the purposes herein stated and that the within consent shall in nowise alter, change or modify any term, covenant, provision or condition hereof nor shall this consent be continuing or extended to any other person, firm or corporation; provided further that said assignee shall in a form entirely satisfactory to the within named Lessor accept said assignment and agree to be bound by all the terms, covenants and conditions of the within lease; that this consent of assignment is limited to the one assignment herein stated, and after such assignment all liability of the within Lessee shall be at an end.)

The lessor required the deposit of security for the performance by petitioner of the lease provisions. To that end Maltby issued to petitioner \$75,000 of its preferred stock which petitioner

agreed to purchase. Petitioner in turn deposited the stock as security with the lessor. PCI, through its trustee, Peter G. Schmidt, and Frank Dupar each guaranteed to Maltby in writing that petitioner would pay the par value of 25 per cent of such stock. Each was required at an undisclosed time to pay the amount so guaranteed for which payment each was subsequently reimbursed by petitioner.

On June 30, 1931, Maltby assigned its interest as lessee to petitioner, said assignment being assented to by the lessor. The assignment was therein stated to be "For One Dollar (\$1.00) and other good and valuable consideration."

The lease had been in negotiation for a period of approximately 10 months prior to its execution. The negotiators had been Dupar, Peter Schmidt and S. W. Thurston, who met with Hauser for negotiation approximately twenty times. At the time of assignment of the lease to petitioner, Dupar insisted upon compensation for his services rendered in the negotiations for the lease, for his guarantee of payment of par value of 25 per cent of the Maltby stock placed with the lessor as security by petitioner, and for what he alleged was his interest in the lease. It was agreed between Maltby, PCI and Dupar that petitioner would pay to them for the assignment of the lease of the hotel premises the amount of \$2,500 per month after payment of the fixed and percentage rentals required by the lease terms. Of this amount, Dupar insisted that he

receive \$625 per month as such compensation. The remainder, it was agreed, would be divided between PCI and Maltby in proportion to their respective stock holdings in petitioner. These payments were provided for by a separate written agreement between petitioner and Maltby entered into simultaneously with the assignment of the lease. Except for an undisclosed but short period of time immediately following inception, these payments have been made throughout the term of the lease and the extension thereof.

At the time the lease was executed the Multnomah Hotel was in bad repair, and it was apparent that large expenditures would be required in order to make it a profitable business asset. To that end, the lease required the expenditure by petitioner of \$21,600 per year over and above all other amounts or that such portion of that amount not so spent be paid to the lessor.

The original lease terminated by its provisions July 1, 1946, but an extension was sought by petitioner as early as 1940 when it became apparent that negotiations by others were in progress in Portland looking toward the construction of a new hotel. Without the expenditure of about \$400,000 for re-equipment, remodeling and redecorating, petitioner's hotel could not withstand the competition of a new hotel. Before making such an investment, therefore, petitioner desired an extension of its lease. Negotiations for the lease extension were carried on

by S. W. Thurston and Dupar, Schmidt having taken no part therein. Ultimately an extension agreement was executed directly between petitioner and the owner of the hotel property. This agreement, dated February 4, 1944, extended the term of the original lease to July 1, 1961, and provided for an increase of the minimum fixed rental to \$8,500 per year. All of the terms and conditions of the original lease remained in full force and effect under the extension agreement, including the provision that the officers and personnel of petitioner were to be the same as Maltby or Western. Simultaneously petitioner and Hauser entered into a separate written agreement whereby provision was made for replacement of the original security of \$75,000 of Maltby preferred stock with a like amount of the common stock of that corporation which was to be forfeited to Hauser as liquidated damages in case of petitioner's default in the lease terms. This was stock purchased and owned by petitioner.

By an agreement between Maltby and Western, as first parties, and petitioner, as second party, dated February 3, 1944, petitioner agreed to continue the payments to Dupar, Maltby and PCI at the rate of \$625, \$1,250 and \$625, respectively, throughout the extended term of petitioner's lease. The consideration therein stated for such extension of the payments is the agreement of said payees to accede to the lease extension at a higher minimum rental before the expiration of the original lease, the

agreement of Maltby that its officers and personnel or that of Western would continue to operate the Multnomah Hotel, and the services of Maltby, Western and Frank Dupar in securing through negotiation the lease extension agreement. Peter G. Schmidt, as trustee of PCI, did not in fact aid in the procurement of the extension agreement. However, he and Dupar each approved the last mentioned agreement by their signatures.

Opinion

In its petition, its opening argument and on brief, petitioner has sought to limit the issue before us to the sole question of whether or not under section 23(a)(1)(A) of the 1939 Code¹ the amounts in controversy are properly deductible for the years

¹Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.

(1) Trade or business expenses.

(A) In general—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

1948 and 1949 as rentals or other amounts necessary for petitioner's use and occupancy of the Multnomah Hotel property. Respondent, on the other hand, takes the view that such amounts are in reality nothing more nor less than distributions in the nature of guaranteed dividends to stockholders of petitioner and generally has determined that they are not deductible as ordinary and necessary business expense.

That the amounts involved, which were paid on either a monthly or a quarterly basis, totaling \$2,500 per month, to Maltby, PCI and Dupar, hereinafter collectively referred to as payees, were not rentals, even though so designated in written contracts between the three payees and petitioner, we think is fairly obvious. In the light of the testimony of Dupar and S. W. Thurston who represented Maltby in all the transactions here involved, it is clear that the basis for the payments was services rendered by the three payees prior to the execution of the original lease in 1931 and also prior to the execution of the renewal agreement in 1944 and for services to be rendered thereafter during the term of the lease and its renewal. Petitioner, in contending that such payments were rentals and in attempting to show adequate consideration, therefore, urges that they were actually compensation for such services rendered in the past and to be rendered throughout the term of the lease. That being true, we cannot conclude otherwise than that such payments were not rentals.

We conclude from the facts as found that all the transactions referred to in such findings, with the exception of the lease and the renewal thereof negotiated with Hauser, were not arrived at on an arm's length basis. We must therefore scrutinize such transactions closely with respect to whether or not the controversial payments are "other payments required to be made as a condition to the continued use" of the hotel premises. The test, of course, lies in the answer to the question as to the likelihood or probability of an interruption in petitioner's use of such property in case it should default in such payments. The facts show clearly a close relationship between the three payees here involved and petitioner. Through a voting trust arrangement, they controlled petitioner. They were the parents responsible for its birth. As of the date of renewal of the lease, through their efforts, petitioner had become an increasingly valuable asset with bright prospects for its future. We do not think it is realistic to conclude that the three payees would have refused longer to render the services required of them in petitioner's operation under the lease in the event of default in the payment of the amounts in controversy, although concededly such default otherwise could have resulted in violation of the terms of the lease through the payees' refusal to longer render the operational services therein required.

We are impressed however that this record fully substantiates the conclusion that whatever the peti-

tioner has named the amounts sought to be deducted, they were compensation for services rendered in the ordinary course of petitioner's business within the meaning of section 23(a)(1)(A). While respondent does contend that the \$2,500 monthly payments are in excess of the true rental value of the hotel premises, he makes no contention that they are excessive or unreasonable as compensation. We think that, in the light of the long experience of all three payees in the hotel business and in view of their efforts in the negotiating of the original lease and the efforts of Dupar and Maltby in the negotiating of the renewal thereof, together with other services required of one or the other of them under the lease and its extension and agreements in pursuance thereof, such compensation is not unreasonable. Accordingly, we hold that the payments in question were deductible by petitioner.

Decision will be entered under Rule 50.

Received February 14, 1956, T.C.U.S.

Served March 2, 1956.

[Title of Tax Court and Cause.]

MOTION TO VACATE AND REVIEW OPINION BY FULL COURT PURSUANT TO SECTION 7460(b) INTERNAL REVENUE CODE OF 1954

Comes Now the respondent, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and moves that the Opinion in the above-entitled case, filed February 23, 1956, be vacated, and that, pursuant to Section 7460(b), Internal Revenue Code of 1954, the Chief Judge order that the opinion be reviewed by the full Court; and, in support of this motion, respectfully represents to the Court that this Opinion involves novel questions of law, is in conflict with other decisions of this Court, is self-contradicting, and is contrary to the stipulated facts and the law of the case, as hereinafter set forth:

1. The Opinion decides a novel question in holding that a court may allow a deduction under a provision of Section 23(a)(1)(A), Internal Revenue Code of 1939, that is separate and distinct from the provision pleaded and argued on briefs by both parties, without affording the opposing party any notice or any opportunity to present evidence or argue the provision on brief.

2. In the holding set forth in the immediately preceding paragraph, the Court implicitly holds, contrary to Rule 7(b)(4) of Rules of Practice Be-

fore the Tax Court of the United States, that in a petition to this Court it is sufficient to allege Section 23(a)(1)(A), Internal Revenue Code of 1939, generally, without specifying any provision thereof.

3. The Opinion conflicts with the numerous decisions in which this Court refused to consider issues not raised by the pleadings. In the instant case, the issue was not raised by the pleadings or by the briefs, but raised for the first time by the Court in its Opinion. *F. H. Wilson* (1928) 12 B.T.A. 403, at 406; *William Bernstein* (Feb. 8, 1952) Memo Op. Docket 29332; *James B. Lowell* (1927) 9 B.T.A. 62, at 65; *Edward S. Phillips* (1927) 9 B.T.A. 1016, at 1019; *Coosa Land Co.* (1933) 29 B.T.A. 389, at 394; *Camp Wolters Land Co.* (1945) 5 T.C. 336, at 347 (Reviewed by the Court), *aff'd.* in part and *rev'd* and remanded in part on other issues. (C.C.A. 5th 1947), 160 F. 2d 84, 35 A.F.T.R. 873; *Welch, Holme & Clark Co.* (1928) 14 B.T.A. 148, at 154; see also *Standard Galvanizing Co. vs. Com.* (C.A. 7th 1953) 202 F. 2d 736, at 739, 43 A.F.T.R. 434 *rev'g.* and remanding *Standard Galvanizing Co. (of Illinois)* (Feb. 25, 1952) Memo Op. Docket 24015.

4. The Opinion conflicts with other decisions of this Court in holding that a sum paid by a corporation to its stockholders may be deducted as compensation under Section 23(a)(1)(A), Internal Revenue Code of 1939, where the stockholder rendered no services. (See the last two sentences in the Findings of Fact, p. 18, and the last two sentences of the Opinion, p. 21, regarding Peter G.

Schmidt (trustee for Pacific Coast Investment Co.) who rendered no services for the sums in question paid to him.)

5. The Opinion conflicts with other decisions of this Court in holding that a sum paid by a corporation and allocated by it amongst its stockholders is deductible as compensation under Section 23(a)(1)(A), Internal Revenue Code of 1939, where the sum is not allocated on the basis of services rendered, but on the basis of stockholdings. (Findings of Fact, p. 16, line 4.) See D. H. Willey Lumber Co. (June 29, 1948) Memo Op. Docket 10864, et al., aff'd. per curiam (C.A. 6th 1949) 177 F. 2d 200, 38 A.F.T.R. 758.

6. The Opinion conflicts with Rule 32 of Rules of Practice Before the Tax Court of the United States and with the fundamental decisions and principles of this Court pertaining to burden of proof in finding a total sum to be reasonable compensation within the meaning of Section 23(a)(1)(A), Internal Revenue Code of 1939, where the taxpayer admits in testimony that it is unable to state how the total sum to be paid was determined or whether it was arbitrarily determined, and the record is devoid of evidence to establish how the total sum was arrived at (Tr. 42, 44, 45, 59, 60).

7. The Opinion and the Findings of Fact contradict each other. The conclusion in the Opinion that the sums in question were compensation paid by the petitioner to the individuals mentioned contra-

dicts paragraph 9 of the Stipulation of Facts wherein the parties stipulated the amount of compensation paid by the petitioner to these individuals. In the Findings of Fact, first sentence, p. 2, it is stated: "Stipulated facts are so found."

Wherefore, it is prayed that this motion be granted.

/s/ JOHN POTTS BARNES, R.E.M.,
Chief Counsel,
Internal Revenue Service.

Denied March 22, 1956, J. Murdock, Judge.

Received and filed March 21, 1956, T.C.U.S.

Served March 30, 1956.

[Title of Tax Court and Cause.]

AMENDMENT TO MOTION TO VACATE AND
REVIEW OPINION BY FULL COURT
PURSUANT TO SECTION 7460(b) IN-
TERNAL REVENUE CODE OF 1954

Comes Now the respondent, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and moves that the respondent's Motion to Vacate and Review Opinion by Full Court Pursuant to Section 7460(b), Internal Revenue Code of 1954, be amended by adding the following paragraphs at page 4 after paragraph 7 and before the Wherefore clause:

8. The conclusions that the sum in question was compensation and that it was reasonable in amount is patently erroneous when it is noted that this sum amounts to \$900,000 (\$30,000 per year for 30 years); and further, that \$450,000, or one-half of this sum, would relate only to renewing the lease.

9. Messrs. Frank Dupar and S. W. Thurston were officers and directors of the petitioner and acted in that capacity when renewing the lease. They were receiving compensation from the petitioner for their services in these capacities (Stipulation, par. 9) and there is no evidence that this compensation was less than reasonable or that it was inadequate for the services rendered in renewing the lease.

/s/ JOHN POTTS BARNES, R.E.M.,
Chief Counsel,
Internal Revenue Service.

Denied March 22, 1956, J. Murdock, Judge.

Filed March 21, 1956, T.C.U.S.

Served March 30, 1956.

The Tax Court of the United States
Washington

Docket No. 52071

MULTNOMAH OPERATING CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Memorandum Findings of Fact and Opinion filed herein February 23, 1956, directing that decision be entered under Rule 50, the parties, filed on June 12, 1956, an agreed computation for entry of decision. In accordance therewith, it is

Ordered and Decided: That there are deficiencies in income tax for 1948 and 1949 in the respective amounts of \$405.43 and \$130.56.

[Seal] /s/ G. G. WITHEY,
 Judge.

Served June 14, 1956.

Entered June 14, 1956.

United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 52071

COMMISSIONER OF INTERNAL REVENUE,

Petitioner on Review,

vs.

MULTNOMAH OPERATING CO.,

Respondent on Review.

PETITION FOR REVIEW

To: The Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on June 13, 1956, ordering and deciding that there are deficiencies in income tax for 1948 and 1949 in the respective amounts of \$405.43 and \$130.56. This petition for review is filed pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

The respondent on review (hereinafter referred to as the taxpayer) is a corporation with its principal office and place of business in Seattle, Washington. The taxpayer filed its United States corporation income tax returns for the calendar years 1948 and 1949 with the Collector of Internal Rev-

enue for the District of Washington, and within the judicial circuit of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought.

Nature of Controversy

The question presented was whether the \$30,000 paid by the taxpayer to three controlling stockholders in each of the taxable years 1948 and 1949 represented rent deductible as a business expense under Sec. 23(a)(1)(A), Internal Revenue Code of 1939, as contended by the taxpayer, or distributions of profits in the nature of dividends as contended by the Commissioner. The Tax Court decided against the Commissioner and held that the amounts sought to be deducted were compensation for services rendered in the ordinary course of taxpayer's business within the meaning of section 23(a)(1)(A); that such compensation is not unreasonable; and that therefore the payments in question were deductible by the taxpayer. The Commissioner's motion, and amendment to motion, to vacate and review opinion by full Court pursuant to Section 7460(b), Internal Revenue Code of 1954, were denied by the Tax Court on March 22, 1956.

/s/ CHARLES K. RICE, C.A.R.
Assistant Attorney General;

/s/ JOHN POTTS BARNES, C.A.R.
Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Filed September 5, 1956. T.C.U.S.

[Title of Court of Appeals and Cause.]

T. C. Docket No. 52071

STATEMENT OF POINTS

Comes Now the petitioner on review herein and makes this concise statement of points on which he intends to rely on the review herein, to wit:

The Tax Court of the United States erred:

1. In basing its decision on an issue which was not framed by the pleadings, hearings and briefs, and without affording the Commissioner an opportunity to present evidence on the new issue or even to brief it.

2. In holding that the \$2,500 monthly payments in question were compensation for services rendered in the ordinary course of taxpayer's business within the meaning of Section 23(a)(1)(A); that such compensation is not unreasonable; and that therefore the payments in question were deductible by the taxpayer.

3. In failing to uphold the action of the Commissioner that the payments in question represented distributions of profits in the nature of dividends and therefore were not deductible by taxpayer.

4. In holding that the basis for the payments was services rendered by the three payees prior to the execution of the original lease in 1931 and also prior to the execution of the renewal agreement in 1944

and for services to be rendered thereafter during the term of the lease and its renewal.

5. In denying the Commissioner's motion, and amendment to motion, to vacate and review opinion by full Court pursuant to Section 7460(b), Internal Revenue Code of 1954.

6. In holding that there are deficiencies in income tax for 1948 and 1949 in the respective amounts of \$405.43 and \$130.56; and in failing to uphold the deficiencies of \$11,805.43 and \$11,530.56, respectively, as determined by the Commissioner.

7. In that its opinion and decision are contrary to law and regulations and are not supported by its findings of fact or substantial evidence.

/s/ CHARLES K. RICE, C.A.R.
Assistant Attorney General;

/s/ JOHN POTTS BARNES, C.A.R.
Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Affidavit of mail attached.

Filed November 14, 1956, T.C.U.S.

In the Tax Court of the United States

Docket No. 52071

MULTNOMAH OPERATING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

U. S. Court of Appeals Courtroom,

U. S. Court House,

Seattle, Washington,

Friday, June 17, 1955.

Before: Honorable Graydon G. Withey, J. Presiding.

Appearances:

HARRY HENKE, JR., ESQ.,

For the Petitioner.

JOSEPH G. WHITE, JR., ESQ.,

Counsel, Internal Revenue Service,

For the Respondent.

PROCEEDINGS

The Clerk: Docket Number 52071, Multnomah Operating Company.

Will counsel please state their appearances for the record.

Mr. Henke: Harry Henke, Jr., appearing for the petitioner, Multnomah Operating Company.

In connection with this case, your Honor, I might state that Mr. Harold L. Scott filed this petition and I would like to ask that we be associated with him in connection with this case and we will actually carry on the trial of the action.

The Court: Very well.

Will you state your appearance, Mr. White?

Mr. White: Joseph G. White, Jr., for the respondent. Ready, your Honor.

The Court: Do you have a fact stipulation in this case?

Mr. Henke: We are going to say that we do not. I think, however, in the course of the proceeding we can stipulate most of the items and we will then adjust them.

Mr. White: You have no written stipulations ready?

Mr. Henke: No.

Mr. White: You have no documents to present?

Mr. Henke: Primarily it's documents that we are [3*] interested in.

Mr. White: I have a rough draft of the various matters that we went over. I do have in the rough draft, though, blank spaces which would call for the information we discussed, like stockholdings and dates and so forth, so perhaps during the noon hour we can go over that together and fill in that and then——

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Henke (Interrupting): I am sure that can be done, I have the man here with all the figures, so it will be just a question of putting them in the record.

Mr. White: Very well.

The Court: All right, I will hear the opening statement of the petitioner at this time.

Mr. Henke: If your Honor please, this case involves a question of payments which were made in connection with a lease of the hotel in Portland, Oregon, known as the Multnomah Hotel. The record—well, the evidence—will show, that the Multnomah Hotel was owned and is still owned by a corporation in Oregon known as the Hauser Investment Company. In 1931 the property was being operated by the Hauser Investment Company. During the year prior to that time, as a result of rather extended negotiations, they agreed to lease the property to Maltby-Thurston Hotels, Inc., a Washington corporation. Under the terms of that lease, which will be made available in evidence, the property was leased to Maltby-Thurston [4] Hotels, Inc., and there was a provision in the lease that the lease could be transferred to a new corporataion to be organized, a new Oregon corporation, which would actually be the operating corporation for the hotel, the provisions of the lease requiring that any such corporation to have available to it and be able to employ the officers of Maltby-Thurston Hotels, Inc., and a corporation known as Western Hotels, Inc.

In addition to that, at that time there was executed a supplemental agreement separate from the

lease, under the terms of which there was deposited 750 shares of the then preferred stock of Maltby-Thurston Hotels, Inc., having a par value of \$75,000. This separate agreement provided that in the event there was any default on the part of the Multnomah Operating Company or Maltby-Thurston Hotels, Inc., for that matter, if it did not transfer the lease, the 750 shares of preferred stock would go to the Hauser Investment Company by way of liquidated damages by reason of the default. That agreement we have not been able to find a copy of, though the records show, the minutes show the approval of the basic agreement and the deposit of the stock.

At the time of the transfer of the lease from Maltby-Thurston Hotels to Multnomah Operating Company there was an additional agreement on the part of Multnomah Operating Company that it would pay to Maltby-Thurston Hotels, to Peter G. Schmidt as trustee, and to Frank A. Dupar, an overriding [5] rental, which was in the amount of \$30,000 a year, which was paid in monthly installments, but represented total payments of that amount, but of which \$15,000 was payable to Maltby-Thurston Hotels, \$7,500 to Peter G. Schmidt, trustee, and \$7,500 to Frank A. Dupar.

The stock of Multnomah Operating Company, a corporation having a very nominal capital, was owned one half by Maltby-Thurston Hotels, Inc., one-quarter by Pacific Coast Investment Company, which Peter G. Schmidt was actually the president of, and the remaining quarter was owned in varying

degrees by Frank A. Dupar and others who were associated with him, particularly his brother Harold Dupar, now deceased, and two other gentlemen who are also now deceased, and all their perspective shares are now being held by the trustee of their estates.

This overriding rental was paid continuously, as a matter of fact, has been paid continuously to date. The original lease was for a period of 15 years, which would have expired in 1946. Prior to the expiration of that lease there were a, there were extended negotiations with the Hauser Investment Company for the extension of the lease. About approximately two and a half years prior to the expiration of the original lease, in 1944, there was an agreement entered into whereby the original lease was extended for an additional period of 15 years. At the same time and as a part of the [6] same transaction, there was entered into an agreement with Hauser Investment Company where, in lieu of the stock which it previously held, there was deposited 750 shares of the common stock of Maltby-Thurston Hotels, Inc., which stock was now owned by Multnomah Operating Company. That was again deposited under the terms of an agreement where that stock was subject to forfeiture by way of liquidated damages to the Hauser estate in the event the terms of the Multnomah lease were not observed. We do have a copy of that agreement and that will be entered into the record and presumptively it is in substantially the same terms as the original

agreement, with respect to the deposit of that security. As I say, the Multnomah Operating Company at this time owned the stock deposited because the stock previously deposited was stock of Maltby-Thurston Hotels, itself, it having deposited stock by way of security, having an indemnity agreement from Pacific Coast Investment Company, from Frank A. Dupar, with respect to their 25 per cent interest which ultimately was repaid, but which was reimbursed by the Multnomah Operating Company.

Under the terms of this extension, in effect the only change of any consequence made was that the basic minimum rent, which had been established in the original lease, was increased by several thousand dollars. Otherwise, the general provisions were the same and this same overriding lease, this overriding payment, continued to the same parties [7] as in the past. That was paid through to the year, 1948, when, upon audit, the Commissioner challenged the continuance of that payment, claiming that it should be accounted for by Multnomah Operating Company as income and considered as distribution made to its shareholders or to the owners of the corporation. That is a question, of course, which is in issue in this proceeding, is the status of that payment made in 1948 by Multnomah Operating Company to Maltby-Thurston Hotels, Inc., to Peter G. Schmidt, as trustee, and to Frank A. Dupar, Individually. Peter G. Schmidt, as trustee, and according to my understanding, was actually trustee for Pacific Coast Investment Company.

The Court: I will hear from the respondent.

Mr. White: Your Honor, I might add a few remarks by way of opening statement. The years in question are the years 1948 and 1949. The deficiency for each year is approximately \$11,800 or a total of approximately \$23,000. The only question in issue is the sums \$30,000 for each year paid by the petitioner to Maltby-Thurston Hotels, Inc., Peter G. Schmidt of Pacific Coast Investment Company and Frank A. Dupar, which was claimed by the petitioner as a rental expense. The respondent has denied, or disallowed, this deduction, claiming that it is not a true rent but a distribution to shareholders.

Mr. Henke has given some background history of this [8] case, your Honor. The sums of \$30,000 per year were paid to these three entities, it commenced in about the year 1931, and it has continued, as far as respondent knows, through the year 1949. Our disallowance is for the years 1948 and 1949.

We wish to point out to the Court at this time that these, that this payment of \$30,000 was divided amongst these three entities, 50 per cent, 25 per cent and 25 per cent. The 50 per cent was paid to Maltby-Thurston who holds 50 per cent of the stock, 25 per cent was paid to Peter G. Schmidt, trustee of the Pacific Coast Investment Company which holds 25 per cent of the stock of the petitioner, 25 per cent was paid to Mr. Frank A. Dupar. It's our understanding that Mr. Frank A. Dupar, and we thought it was a Mr. Bassett, but we may not be absolutely sure on that, and the evidence will show, to split the stockholding association, but we understood Mr. Dupar and Mr. Bassett, who is now deceased, held

jointly 25 per cent of the stock of the petitioner. In any event, Mr. Dupar, through associations held 25 per cent of the stock of the petitioner and he received 25 per cent of this so-called rental. The respondent wishes to state and it is its contention that there was no consideration for these payments to these three entities. The properties known as the Multnomah Hotel was owned by another corporation, Hauser. The original lease was between Hauser and Maltby-Thurston, Inc. There is no evidence that at the time of this original lease in 1931 [9] the lease had any bonus value or there was any reason why such a high consideration should have been paid for its consignment, nor is there any reason why this so-called rental should have been paid to entities which are not lessees under this original lease. This condition remained until about 1944 when there was a renewal or extension of a lease two years prior to its termination. Again, the same condition arises and the same question, well, why are these sums of money paid to these three individuals? The lessee is Hauser, the lessor is Hauser, the lessee is Maltby-Thurston and at this time Maltby-Thurston has only two years remaining of its lease. Why does the petitioner obligate itself for 15 years to pay this thirty thousand to these three entities? We wish to point out, your Honor, that some question may arise as to, well, what difference does it make to the two corporations, Maltby-Thurston and Pacific Coast, whether they classify this as a dividend or as a rental? If it's a dividend,

they might receive a dividend-paid credit. The first answer to that is that it doesn't apply to Mr. Frank A. Dupar who is an individual. The second answer, that when this was instituted in 1931 there was no such thing, that was not instituted until 1936, so it did make a difference, it made a difference to the petitioner, it receives a deduction if it's rental, no deduction if it is a dividend.

That concludes the respondent's remarks, your Honor, [10] and we are ready to proceed.

The Court: Call your first witness.

Mr. Henke: There are a number of documents to be introduced which possibly we can stipulate into the record now.

Did you have those leases and various documents?

Mr. White: I have returned them to you.

Mr. Henke: Oh!

The first document I ask to be marked for identification is the original lease of June, 1931.

The Clerk: Exhibit 1 for identification.

(Petitioner's Exhibit Number 1 was marked for identification.)

Mr. Henke: I believe you are agreeable that this be stipulated into the record.

Mr. White: So stipulated.

The Court: It will be received.

(Petitioner's Exhibit Number 1 was received in evidence.)

PETITIONER'S EXHIBIT No. 1

This Indenture of Lease dated the 17th day of June, 1931, by and between Hauser Securities Company, an Oregon corporation, the Lessor, and Maltby-Thurston Hotels, Inc., a Washington corporation, the Lessee,

Witnesseth:

Article I.

Grant.

That the Lessor, for and in consideration of the rents, covenants and conditions herein reserved and set forth on the part of said Lessee to be paid, kept and performed, does hereby rent, lease, let and demise unto the Lessee, to Have and to Hold, all the following described real property situate and being in the City of Portland, County of Multnomah and State of Oregon, and more particularly described as:

“All of Lots One (1) to Eight (8), inclusive, Block Forty-four (44), City of Portland, Multnomah County, Oregon, said premises being generally known as Multnomah Hotel of Portland, Oregon;”

also, the furniture, fixtures, equipment and/or personal property contained in said hotel and owned by the Lessor which is maintained in the above described premises, the same being specifically listed in an inventory which is hereby referred to as Exhibit “A” and to which the parties hereto have affixed their signatures for the purpose of identifica-

Petitioner's Exhibit No. 1—(Continued)

tion, which by reference thereto is made a part hereof as though fully incorporated herein, for and during the full term of fifteen years, commencing on the first day of July, 1931, at six o'clock a.m. of said day and ending on the first day of July, 1946, and six o'clock a.m. of said day unless same be sooner terminated as herein provided.

Article II.

Percentage Rental of Gross Revenue.

That during the term of this lease the Lessee agrees to pay unconditionally to the Lessor at such place in the City of Portland, Oregon, as the Lessor may from time to time designate in writing by the way of rental (a) fifteen per cent (15%) of the gross revenue except gross revenue provided for in subsection (b) hereof, from the maintenance, operation, leasing and use of the premises and property herein described and from the subletting, renting and leasing of store rooms or any space in said premises as herein permitted and from the use and operation of said premises as a hotel, including all departments thereof such as rooms, ballrooms, laundry service, telephone service (except such long distance income as is credited wholly and directly to the Telephone Company), concessions, lights to tenants of stores and concessions, tailor shop, miscellaneous and incidental activities and (b) seven per cent (7%) of the gross revenue from the maintenance and operation of restaurant, banquets, cafe-

Petitioner's Exhibit No. 1—(Continued)

teria, coffee shop, restaurant sundries and income from sale of garbage and bottles. Said payments of 15% and 7%, as above specified, shall be paid during the entire period of this lease; provided, however, that nothing herein contained shall release said Lessee from the payment to Lessor of the minimum fixed monthly rental hereinafter provided for in Article III.

Article III.

Minimum Fixed Monthly Rental.

That during the entire term of this lease notwithstanding anything herein contained that might be considered to the contrary, the Lessee agrees to pay to the Lessor unconditionally (except as provided in sub-section (a) of this Article III) by the way of rental for said premises not less than the net sum of Seven Thousand Dollars (\$7,000.00) per month for the period beginning on the first day of July, 1931, at six o'clock a.m. of said day and ending on the first day of July, 1946, at six o'clock a.m. of said day, which rental shall be known as a "minimum fixed monthly rental."

Article X.

[Lessee agrees to pay taxes, assessments.]

Article XIV.

[Lessee covenants to protect property by insurance at its own expense.]

Petitioner's Exhibit No. 1—(Continued)

Article XV.

[Lessee agrees to pay for licenses and permits.]

Articles XVI and XVII

[Lessee agrees to keep premises in good repair; Lessee agrees to spend \$21,600.00 per year on maintenance or pay to Lessor any sum short of that.]

Article XXII.

[Lessee agrees to protect Lessor from liability.]

Article XXVIII.

Subleases.

All leases, rental agreements or otherwise, written or verbal, made by said Lessee, pertaining to the premises hereby leased, shall be separate and distinct agreements and set forth specifically the amount of rental (said rental to be a bona fide sum) to be paid for said premises herein demised and said leases, rental agreements or otherwise, shall be inferior and subordinate to the within lease and the same shall so provide * * * It being expressly understood and agreed that the within-named lessor has the exclusive option and right of terminating any such subleases, agreements or occupancies in the event of the cancellation, surrender or termination of the within lease by giving written notice to that effect to said subtenants, lessees or occupants as above stated.

Petitioner's Exhibit No. 1—(Continued)

Article XXIX.

Assignment.

This lease to a large extent is based upon the personnel of the present officers of said Lessee and their ability to conduct and operate a first-class hotel and by reason thereof Lessee covenants and agrees not to assign this lease nor sublet nor underlet nor permit any other person or persons to occupy said premises other than the employees and patrons of said Lessee without the consent of said Lessor being first obtained in writing[, * * * save and except that this inhibition does not prevent the sub-leasing of storerooms on the ground floor of the premises hereby demised and other space therein to organizations or institutions of a character, in the opinion of Lessee, to be advantageous to the operation of said hotel, subject to the conditions of this lease, that said inhibitions shall include any assignment or transfer, underletting or subletting of said premises by operation of law or otherwise, it being specifically understood and agreed that these inhibitions include and comprehend any assignments, transfer, subletting or underletting that might be in any manner accomplished by receivership or attachment or execution or by any other legal or judicial process and any and all voluntary or involuntary assignments of any and every kind and proceedings in bankruptcy]. (Provided further that it is understood and agreed that the within Lessee contem-

Petitioner's Exhibit No. 1—(Continued)

plates the forming of an Oregon corporation to whom the within lease may be assigned by it, the majority of the personnel of which will be the same as that of the within named Lessee and/or Western Hotels Inc. and Lessor consents to the within named Lessee assigning the within lease to said corporation to be duly formed providing that said assignment shall be subject to all of the terms, covenants and conditions of the within lease and with the consent that the demised premises are only to be used for the purposes herein stated and that the within consent shall in nowise alter, change or modify any term, covenant, provision or condition hereof nor shall this consent be continuing or extended to any other person, firm or corporation; provided further that said assignee shall in a form entirely satisfactory to the within-named Lessor accept said assignment and agree to be bound by all the terms, covenants and conditions of the within lease; that this consent of assignment is limited to the one assignment herein stated, and after such assignment all liability of the within Lessee shall be at an end.)

Article XXXV.

Use of Name.

It is further covenanted and agreed that in the event of a forfeiture of the within lease by Lessee, then the Lessor shall have the right to use any name, mark, plan, or publicity scheme adopted by said Lessee as the same may apply to the premises herein demised or any part thereof; provided, however, that the name "Western Hotels" or any symbol

Petitioner's Exhibit No. 1—(Continued)
thereof, is not included within the purview of this
Article XXXV.

Article XXXIX.

Successors and Assigns.

It is mutually covenanted and agreed by the parties hereto that all of the expressions, terms, conditions, provisions and agreements shall extend to and be binding upon and inure to the benefit of, as the case may be, the successors and assigns in interest of the Lessor or Lessee; provided, however, that no assignment may be made by the Lessee or by operation of law without the consent of the Lessor, as hereinbefore provided in Article XXIX.

In Witness Whereof, the said Hauser Securities Company, an Oregon corporation, and said Maltby-Thurston Hotels, Inc., have caused this and another instrument of like tenor to be executed in their respective corporate names by their respective officers thereunto duly authorized and the respective corporate seals to be hereto affixed, pursuant to resolution duly and legally adopted by the respective Boards of Directors or Trustees, on the day and year first above written.

HAUSER SECURITIES
COMPANY,

By /s/ RUPERT V. HAUSER,
President;

By /s/ A. E. TWEEDDALE,
Secretary.

Petitioner's Exhibit No. 1—(Continued)

MALTBY-THURSTON
HOTELS, INC.,

By /s/ S. W. THURSTON,
President,

By /s/ H. E. MALTBY,
Secretary.

Admitted in evidence June 17, 1955.

Mr. Henke: This is a rather extended document and apparently is the only copy we have in the office here and what we propose and I assume that counsel is agreeable to, is to ask leave to withdraw that exhibit and make a copy of those portions which either counsel considers pertinent to the case and substitute that in lieu of the original lease itself. [11]

The Court: I will make a general ruling at this time that either party may, in the absence of any specific objection, remove any original exhibit and substitute a copy.

Mr. Henke: In this particular one, it was our desire to eliminate certain portions of it, in other words, this is one of these rather extended hotel leases which covers damage and fire and so on, which is not pertinent so our thought was we could just copy those portions which counsel respectively want to put in.

Mr. White: So agreed.

Mr. Henke: Will you mark this, Mr. Clerk?

The Clerk: Exhibit 2 for identification.

(Petitioner's Exhibit Number 2 was marked for identification.)

Mr. Henke: This is copies of the original assignment by Maltby-Thurston Hotels to Multnomah Operating Company of the lease of June 17, 1931, together with the acceptance of that assignment by the Hauser Securities Company.

Mr. White: I have no objection to this document, but I want to make these remarks at this time, that the respondent does not stipulate to any consideration in the amount of \$30,000, the sums in question—strike that remark.

The respondent wants to make it clear that its contention that it's not so stipulated, that there was any consideration paid to Multnomah Hotel for \$30,000 which it [12] has agreed to pay these three entities and the respondent is not stipulating that there was any bonding or legal obligation on the part of Multnomah to pay that \$30,000, and we would like to also make clear for the record that we don't intend to foreclose ourselves at this time as to testimony on the part of the Multnomah by the petitioner, explaining the circumstances of this \$30,000 payment. So if that is agreeable with the petitioner, we will stipulate that the document may be introduced in evidence.

Mr. Henke: The document isn't intended to prejudice the position of the Commissioner in any way, it's merely by way of showing the actual

assignment of the lease in accordance with the original terms.

The Court: It may be received.

The Clerk: Exhibit 2.

(Petitioner's Exhibit Number 2 was received in evidence.)

PETITIONER'S EXHIBIT No. 2

Portland, Oregon, June 30, 1931.

For One Dollar (\$1.00) and other good and valuable consideration, the undersigned, Maltby-Thurston Hotels, Inc., a Washington corporation, does hereby assign, set over and transfer to Multnomah Operating Co., an Oregon corporation, all of its right, title and interest in and to that certain lease made, executed and delivered on the 17th day of June, 1931, by and between Hauser Securities Company, an Oregon corporation, as lessor and the undersigned, Maltby-Thurston Hotels Inc., a Washington corporation, as lessee, subject to all the terms, covenants and conditions of said lease and with the understanding that the demised premises are only to be used for the purposes in said lease stated and that the consent to this assignment shall in nowise alter, change or modify any term, covenant, provision or condition thereof nor shall the consent to this assignment be continuing or extended to any other person, firm or corporation

Petitioner's Exhibit No. 2—(Continued)
and with the understanding that said Multnomah
Operating Co. is bound by all the terms, covenants
and conditions of said lease.

MALTBY-THURSTON
HOTELS INC.,

By /s/ S. W. THURSTON,
President,

By /s/ H. W. CASSON,
Asst. Secretary.

(Corporate Seal Maltby-Thurston Hotels, Inc.)

For and in consideration of the above assignment
and for One Dollar (\$1.00) and other good and
valuable considerations, the undersigned, Mult-
nomah Operating Co., an Oregon corporation,
hereby agrees to be bound by and to fully perform
all the terms, covenants and conditions of the above
mentioned lease and consent to said assignment.

MULTNOMAH
OPERATING CO.,

By /s/ S. W. THURSTON,
President,

By /s/ FRANK A. DUPAR,
Secretary.

Whereas by Article XXIX, of that certain lease
made and entered into on the 17th day of June,
1931, by and between Hauser Securities Company,

Petitioner's Exhibit No. 2—(Continued)

an Oregon corporation, as lessor and Maltby-Thurston Hotels, Inc., a Washington corporation, as lessee, it is provided that said lease should be assigned to a corporation to be duly formed as therein provided and

Whereas the above corporation known as Multnomah Operating Co., an Oregon corporation, has been duly organized in accordance with the terms of said Article in the above mentioned lease, and in pursuance of the provision provided for in said Article, the undersigned, Hauser Securities Company consents to the aforesaid lease being assigned by Maltby-Thurston Hotels, Inc. to Multnomah Operating Co., an Oregon corporation, subject to all the terms, covenants, *providions* and conditions of the within lease.

This consent is given as in said lease provided, that the demised premises are only to be used for the purposes in said lease stated and that the within consent shall in nowise alter, change or modify any term, provision or condition thereof nor shall this consent be continuing or extended to any other person, firm or corporation, and that said Multnomah Operating Co. assumes and is bound by all of the terms of said lease and this consent.

HAUSER SECURITIES
COMPANY,

By /s/ RUPERT V. HAUSER,
President,

Petitioner's Exhibit No. 2—(Continued)

By /s/ A. E. TWEEDDALE,
Secretary.

Dated at Portland, Oregon, this 30th day of June,
1931.

(Corporate Seal Hauser Sec. Co.)

Admitted in evidence June 17, 1955.

Mr. Henke: Might we have just one moment?

The Court: We will be off the record.

(Discussion off the record.)

The Court: On the record.

Mr. Henke: Would you mark this, please?

The Clerk: Exhibit 3 for identification.

(Petitioner's Exhibit No. 3 was marked for
identification.) [13]

Mr. Henke: Exhibit 3 offered for identification
is the supplemental indenture amending the lease of
December, 1944, as between the Hauser Securities
Company and Multnomah Operating, and I believe
it's agreeable, counsel, that that also be stipulated in
the record?

Mr. White: It may be received; so stipulated,
your Honor.

The Court: It may be received.

The Clerk: Exhibit 3.

(Petitioner's Exhibit Number 3 was received
in evidence.)

PETITIONER'S EXHIBIT No. 3

Supplemental Indenture Amending and
Extending Lease

This Supplemental Indenture, dated this 4th day of February, 1944, but effective as of February 1, 1944, by and between Hauser Securities Company, an Oregon corporation, the Lessor, and Multnomah Operating Co., an Oregon corporation, the Lessee, for and in consideration of mutual covenants and other valuable considerations passing between the parties, the receipt whereof is hereby acknowledged,

Witnesseth:

Whereas, on the 17th day of June, 1931, an Indenture of Lease was entered into between Hauser Securities Company, an Oregon corporation, and Maltby-Thurston Hotels, Inc., a Washington corporation, upon the real property hereinafter described, the premises thereon being generally known as Multnomah Hotel of Portland, Oregon, together with certain furniture, fixtures and equipment maintained in said hotel premises, reference to which indenture of lease is hereby made and by such reference said lease is made a part hereof; and thereafter on June 30, 1931, for a valuable consideration said lease was assigned and transferred to Multnomah Operating Co., an Oregon corporation, with the understanding that said Multnomah Operating Co. was to be bound by all the terms, covenants and conditions of said lease; and

Petitioner's Exhibit No. 3—(Continued)

Whereas, said Indenture of Lease would, unless terminated as otherwise provided in the lease or unless extended as herein provided, end on the 1st day of July, 1946, and the parties have agreed upon the terms and conditions upon which said lease shall be amended and that the new terms and conditions thereof shall be effective beginning February 1, 1944, and that said lease as so amended and modified shall be extended and continued in force subject to all the terms and conditions thereof until July 1, 1961;

Now, Therefore, in consideration of the premises and other valuable considerations, it is hereby agreed as follows:

1. That certain Indenture of Lease dated June 17, 1931, by and between Hauser Securities Company, an Oregon corporation, and Maltby-Thurston Hotels, Inc., a Washington corporation, which was assigned to Multnomah Operating Co., by said assignment dated June 30, 1931, and the term thereof, shall be and the same is hereby extended for and during the full term of seventeen years and five months, commencing on the 1st day of February, 1944, at six o'clock a.m. of said day and ending on the 1st day of July, 1961, at six o'clock a.m. of said day, unless the same be sooner terminated as in said lease provided; subject, however, to all the terms, covenants and conditions of said lease and the due, punctual and proper performance thereof by lessee, and subject also to all the terms, covenants and conditions of this Supplemental Indenture and the due, prompt and punctual performance thereof by lessee.

Petitioner's Exhibit No. 3—(Continued)

2. It is understood that the existing lease dated June 17, 1931, would, unless amended, extended or terminated as provided in said lease, end on July 1, 1946, and that one of the considerations for the extension of said lease is the fact that the agreed minimum rental for the extended term and all the terms, conditions and provisions of said lease as extended and amended by this Supplemental Indenture shall be effective and binding from February 1, 1944, and that lessee expressly waives any provisions of said original lease inconsistent with this Supplemental Indenture.

3. Article III of said Indenture of Lease dated June 17, 1931, shall be and the same is hereby amended so as to read as follows:

“Article III.

“Minimum Fixed Monthly Rental.

“That during the entire term of this lease, notwithstanding anything herein contained that might be considered to the contrary, the lessee agrees to pay the lessor unconditionally by the way of rental for said premises not less than the net sum of Eight Thousand Five Hundred Dollars (\$8,500.00) per month for the period beginning on the 1st day of February, 1944, at six o'clock a.m. of said day and ending on the 1st day of July, 1961, at six o'clock a.m. of said day, which rental shall be known as a 'minimum fixed monthly rental.' * * *”

Petitioner's Exhibit No. 3—(Continued)

10. Article XXIX of said Indenture of Lease dated June 17, 1931, shall be and the same is hereby amended so as to read as follows:

“Article XXIX.

“Assignment.

“This lease to a large extent is based upon the personnel of the present officers of said lessee and their ability to conduct and operate a first-class hotel and by reason thereof lessee covenants and agrees not to assign this lease nor sublet nor underlet nor permit any other person or persons to occupy said premises other than the employees and patrons of said lessee without the consent of said lessor being first obtained in writing, save and except that this inhibition does not prevent the subleasing of storerooms on the ground floor of the premises hereby demised and other space therein to organizations or institutions of a character, in the opinion of lessee, to be advantageous to the operation of said hotel, subject to the conditions of this lease, that said inhibitions shall include any assignment or transfer, underletting or subletting of said premises by operation of law or otherwise, it being specifically understood and agreed that these inhibitions include and comprehend any assignment, transfer, subletting or underletting that might be in any manner accomplished by receivership or attachment or execution or by any other legal or judicial process and any and all voluntary or in-

Petitioner's Exhibit No. 3—(Continued)

voluntary assignments of any and every kind and proceedings in bankruptcy.

“Lessee covenants that the majority of the personnel of lessee will continue to be the same as that of Maltby-Thurston Hotels, Inc., and/or Western Hotels, Inc., unless (a) said personnel is changed by death or (b) unless the written consent of lessor to change in personnel is secured. Lessee further covenants that it has secured the consent and agreement of Maltby-Thurston Hotels, Inc., and of Western Hotels, Inc., to the provisions of this Article.”

In Witness Whereof, the said Hauser Securities Company, an Oregon corporation, and said Multnomah Operating Co. have caused this Supplemental Indenture Amending and Extending Lease to be executed in their respective corporate names by their respective officers thereunto duly authorized and the respective corporate seals to be hereto affixed, pursuant to resolution duly and legally adopted by the respective Boards of Directors or Trustees, on the day and year first above written.

(Corporate Seal, Hauser Sec. Co.)

HAUSER SECURITIES
COMPANY,

By /s/ RUPERT V. HAUSER,
President;

Petitioner's Exhibit No. 3—(Continued)

By /s/ A. E. TWEEDDALE,
Secretary.

(Corporate Seal, Multnomah Operating Co.)

**MULTNOMAH OPERATING
COMPANY,**

By /s/ S. W. THURSTON,
President;

By /s/ F. A. DUPAR,
Secretary.

Admitted in evidence June 17, 1955.

Mr. Henke: Will you mark this?

The Clerk: Exhibit 4 for identification.

(Petitioner's Exhibit Number 4 was marked
for identification.)

Mr. Henke: This is a supplemental agreement of February 4, 1944, between Multnomah Operating Company and Hauser Securities Company, whereby Multnomah Operating Company deposited as additional security for the extended lease 750 shares of common stock of Maltby-Thurston Hotels, Inc.

The Court: Is there an objection?

Mr. White: No objection, your Honor.

The Court: It may be received.

The Clerk: Exhibit 4.

(Petitioner's Exhibit Number 4 was received
in evidence.) [14]

PETITIONER'S EXHIBIT No. 4

This Agreement made and entered into this 4th day of February, 1944, by and between Multnomah Operating Company, an Oregon corporation, herein referred to as Lessee, and Hauser Securities Co., an Oregon corporation, herein referred to as Lessor,

Witnesseth:

Whereas, the said Lessor and Lessee have simultaneously herewith entered into a certain written Supplemental Indenture Amending and Extending Lease of June 17, 1931, covering those certain premises described in said lease and generally known as the Multnomah Hotel in the City of Portland, Oregon, for a term of seventeen years and five months beginning with the 1st day of February, 1944, and ending on the 1st day of July, 1961, all as provided for in said lease, and

Whereas, negotiations between the parties have been under way for a long period of time, and

Whereas, said Lessor has insisted upon the payment of \$50,000.00 in cash as a consideration for the execution of said lease and that Maltby-Thurston Hotels, Inc., a Washington corporation, guaranteed the performance of said lease throughout the entire period of said lease, and

Whereas, said Maltby-Thurston Hotels, Inc., is represented as a corporation having a large financial worth, and

Petitioner's Exhibit No. 4—(Continued)

Whereas, the parties hereto have reached an agreement as covered by the aforementioned lease,

Now, Therefore, in consideration of the execution of the aforesaid Supplemental Indenture Amending and Extending Lease and the mutual covenants and agreements herein contained to be kept and performed,

It Is Mutually Agreed between the parties hereto:

1. That there is hereby delivered to said Lessor Certificates representing 750 shares of no par value common stock of Maltby-Thurston Hotels, Inc., a Washington corporation, which is fully paid and non-assessable which is delivered and is to be held by said Hauser Securities Company as security and to protect said Lessor in the prompt and due performance of all and every provision, covenant and condition of that certain lease hereinabove referred to as extended and amended by said supplemental indenture.

2. In case of any default, breach, non-observance or non-performance of any of the covenants, terms or conditions contained in said written lease above mentioned as so extended and amended which are to be kept, done, observed and performed on the part of lessee or upon the failure to keep and perform any provision herein contained, and lessor exercises any right or rights given to it under Article XXXVIII of said lease, the said Lessor shall have the right to sell, assign, transfer or dispose of said

Petitioner's Exhibit No. 4—(Continued)

stock or any part thereof and to keep and hold the proceeds arising from the sale, transfer or other disposition of said stock or any part thereof as its own and absolute property without accounting to said lessee for any of the said proceeds and in case of any breach of the conditions as aforesaid, the said Lessor may sell and dispose of said stock at private sale without giving the said Lessee any notice whatsoever of its intention so to dispose of and sell said stock or any part thereof or at the option of said Lessor, it may retain said stock as its own and absolute property and have the same re-issued to it as absolute owner.

3. That until default occurs in said lease or under this agreement, any and all dividends hereunder shall be paid to Hauser Securities Company and by it in turn paid over to said Multnomah Operating Company.

4. While said stock is issued to said Lessor as "pledgee," the said term is not to be construed in the light of the law of pledges or the rights or powers of a pledgee but said stock is to be governed and controlled and subject to all the terms, covenants and conditions hereof as though the word "pledgee" did not appear in said stock certificate. The word "pledgee" shall not in any wise limit, modify or qualify any of the rights hereunder.

5. It Is Expressly Mutually Understood and Agreed that the said Multnomah Hotel owned by said Lessor has reached an enviable position in the Northwest as a hotel and its standing is of the

Petitioner's Exhibit No. 4—(Continued)

highest order and great loss and damage would be sustained by said Lessor in the event it was necessary to cancel and retake said premises and valuable rights are conferred by the leasing of said premises and in consideration of the waiver of the points and conditions set forth in the preamble of this agreement, it is distinctly understood that the amount of damages which the Lessor may sustain by reason of the breach of said lease and the waiver of the points first hereinabove enumerated cannot be estimated or determined and hence the said stock or proceeds derived therefrom is to be taken as liquidated damages and not as a penalty but is expressly paid as liquidated damages and said Lessee warrants that it will make no claim to the contrary.

6. In the event that said Lessee shall promptly, faithfully and truly keep, do, observe and perform all of the terms, conditions, covenants and agreements of said lease as so amended and extended which are to be kept, done, observed and performed on the part of said Lessee, then upon the termination of said written lease, said Lessor will retransfer and deliver to said Lessee all of said stock above described.

7. This agreement is binding upon the parties hereto, their successors and assigns.

In Witness Whereof, the parties hereto have caused their corporate names to be hereto affixed by their proper officers first duly authorized.

(Corporate Seal, Multnomah Operating Company.)

Petitioner's Exhibit No. 4—(Continued)

(Corporate Seal, Hauser Sec. Co.)

MULTNOMAH OPERATING
COMPANY,

By /s/ S. W. THURSTON,
President;

By /s/ F. A. DUPAR,
Secretary.

HAUSER SECURITIES CO.,

By /s/ RUPERT V. HAUSER,
President;

By /s/ A. E. TWEEDDALE,
Secretary.

Admitted in evidence June 17, 1955.

The Clerk: Exhibit 5 for identification.

(Petitioner's Exhibit Number 5 was marked
for identification.)

Mr. Henke: This is an agreement of February 3, 1944, between Maltby-Thurston Hotels, Inc.; Western Hotels, and Multnomah Operating Company, in regard to the continued payment of the supplemental rentals which are the subject of the dispute in this case.

Mr. White: I have no objection, your Honor, except for the same qualifications which respondent has stated in reference to Exhibit 2.

The Court: So understood. It may be received.

The Clerk: Exhibit 5.

(Petitioner's Exhibit Number 5 was received
in evidence.)

PETITIONER'S EXHIBIT No. 5

Memorandum of Agreement

This Agreement, entered into this 3rd day of February, 1944, by and between Maltby-Thurston Hotels, Inc., and Western Hotels, Inc., both Washington corporations, hereinafter called "parties of the first part," and Multnomah Operating Co., an Oregon corporation, hereinafter called "party of the second part," in consideration of mutual promises and other valuable consideration, receipt whereof is hereby acknowledged,

Witnesseth:

Whereas, on June 17, 1931, an Indenture of Lease was entered into between Hauser Securities Company, an Oregon corporation, as lessor, and Maltby-Thurston Hotels, Inc., as lessee, covering premises known as Multnomah Hotel, of Portland, Oregon, which lease was negotiated by Maltby-Thurston Hotels, Inc., by and with the participation and assistance of Peter G. Schmidt, Trustee, and Frank A. Dupar; and thereafter said lease was sold, transferred and assigned to Multnomah Operating Co. pursuant to provisions of Article XXIX of said lease, which provided that said lease could be assigned to an Oregon corporation providing the majority of the personnel thereof will be the same as that of Maltby-Thurston Hotels, Inc., and/or Western Hotels, Inc.; and

Whereas, said transfer and assignment to Multnomah Operating Co. was upon certain terms and

Petitioner's Exhibit No. 5—(Continued)

conditions, including the payment of \$2,500.00 to be paid each month for each and every month of the full term of such lease, said payments to be made to Maltby-Thurston Hotels, Inc., \$1,250.00 per month, Peter G. Schmidt, Trustee, \$625.00 per month, and Frank A. Dupar, \$625.00 per month; and

Whereas, said lease, unless otherwise extended, would by its terms terminate on July 1, 1946, and the parties are desirous of securing an extension of said lease and such extension has been negotiated by and with the assistance of Maltby-Thurston Hotels, Inc., Peter G. Schmidt, Trustee, and Frank A. Dupar and such extended lease provides for the minimum rentals to be paid thereunder, in larger amount than previously, and that such rental provisions and other provisions and conditions of the extension are to take effect as of February 1, 1944, rather than to await the expiration of the original term of said lease, all of which has been consented to by Maltby-Thurston Hotels, Inc.; Peter G. Schmidt, Trustee, and Frank A. Dupar, whose payments from Multnomah Operating Co. may be affected thereby; and

Whereas, the parties now desire to define their future rights, duties and obligations with reference to this matter;

Now, Therefore, it is hereby agreed:

1. Maltby-Thurston Hotels, Inc., the party of the

Petitioner's Exhibit No. 5—(Continued)

first part, hereby consents to the instrument designated "Supplemental Indenture Amending and Extending Lease," to be entered into as of the same date hereof, and further agrees that the payment of the rentals provided for in the amended and extended lease shall be a prior charge and claim which party of the second part is to pay each month before the payment in said month of the monthly payments of party of the second part to Maltby-Thurston Hotels, Inc., Peter G. Schmidt, Trustee, and Frank A. Dupar. To this agreement party of the first part warrants that it has procured or will procure the consent of said Peter G. Schmidt, Trustee, and Frank A. Dupar.

2. Party of the second part agrees that one of the considerations by which it was able to secure the extension and amendment of said lease was the assurance of Maltby-Thurston Hotels, Inc., to Hauser Securities Company, the lessor, that the provisions of Article XXIX of the original lease would be continued in force with respect to the covenant that the majority of the personnel of Multnomah Operating Co. would be the same as that of Maltby-Thurston Hotels, Inc., and/or Western Hotels, Inc. Accordingly, parties of the first part agree that the personnel of the Oregon corporation, to which said lease was assigned, namely, Multnomah Operating Co., will continue to be the same as that of Maltby-Thurston Hotels, Inc., and/or Western Hotels, Inc., unless (a) said personnel is

Petitioner's Exhibit No. 5—(Continued)

changed by death or (b) the consent of the lessor, Hauser Securities Company, is received to the change of personnel.

3. Party of the second part agrees that the extension of said lease has been procured through the efforts of personnel of Maltby-Thurston Hotels, Inc., and of Western Hotels, Inc., with the personal assistance of Frank A. Dupar and S. W. Thurston. In consideration of procuring such extension and in consideration of the other covenants, terms and provisions of this agreement, Multnomah Operating Co. agrees that the monthly payment of \$2500.00 which was the consideration for the assignment of said lease, shall continue to the end of the full extended term. Party of the second part therefore covenants and agrees for the consideration aforesaid to pay for each and every month during the full extended term of said lease the sum of \$1250.00 per month to Maltby-Thurston Hotels, Inc., or its distributees or assigns, \$625.00 per month to Peter G. Schmidt, Trustee, or his assigns, and \$625.00 per month to Frank A. Dupar or his assigns; provided, however, that said payments may by agreement be paid quarterly, semi-annually or annually.

4. It is further understood and agreed that in consideration hereof parties of the first part agree to co-operate with party of the second part in the successful operation of the hotel and to give it such assistance as they properly can, provided that they undertake hereby no obligation to pay any part of

Petitioner's Exhibit No. 5—(Continued)
the underlying rental or any of the operating expenses of the hotel, and it is further understood that the assistance to be furnished hereunder shall not prevent Western Hotels Inc., from providing management services for said hotel for a consideration, according to previous practice.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their duly authorized officers the day and year in this instrument first above written.

MALTBY-THURSTON
HOTELS, INC.,

By /s/ S. W. THURSTON,
President;

By /s/ H. E. MALTBY,
Secretary.

WESTERN HOTELS, INC.,

By /s/ S. W. THURSTON,
President;

By /s/ F. A. DUPAR,
Secretary.

MULTNOMAH OPERATING
CO.,

By /s/ S. W. THURSTON,
President;

By /s/ F. A. DUPAR,
Secretary.

Petitioner's Exhibit No. 5—(Continued)

Approved:

/s/ PETER G. SCHMIDT,

/s/ FRANK A. DUPAR.

Admitted in evidence June 17, 1955.

Mr. Henke: We will call Mr. Frank A. Dupar.

FRANK A. DUPAR

was called as a witness by and on behalf of the petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name and address, Mr. Witness?

The Witness: Frank A. Dupar.

Direct Examination

By Mr. Henke: [15]

Q. Will you state your address?

A. 4318 Fifty-Fifth Northeast, Seattle.

Q. Mr. Dupar, referring to the Multnomah Operating Company, what is your relationship to that corporation?

A. I am the president of the corporation at the present time.

Q. Have you always been president of the corporation?

A. No. Mr. Thurston was president for, oh, up until the last three years.

(Testimony of Frank A. Dupar.)

Q. What office did you hold prior to that time?

A. I was secretary.

Q. And were you secretary from the time the corporation was originally formed? A. Yes.

Q. In June of 1931, when the lease of the Multnomah Hotel was organized, can you state what the relationship was between Maltby-Thurston Hotels, Inc., Pacific Coast Investment Company and yourself?

A. We had, about a year before we had organized the Western Hotels, the management company. It was a case of three very bitter competitors trying to live together.

Q. How was the stock of Western Hotels owned?

A. The stock was owned 50 per cent by Maltby-Thurston Hotels, Inc., and 25 per cent by the Pacific Coast Investment Company and 25 per cent by myself. [16]

Q. Now, you said these participants were bitter competitors. Can you explain what you meant by that statement?

A. Well, they had been fighting all over the state. One instance is up in Bellingham, where the P.C.I. interests owned the Leopold Hotel. The Maltby-Thurston interests, along with the Metropolitan Building Company people here, suddenly decided to build a hotel up there, called the Bellingham Hotel. There was a race to see who could get their hotel opened first. Then there was a very bitter battle to see who could stay alive.

(Testimony of Frank A. Dupar.)

Q. In regard to the negotiations for the Multnomah, who carried on those negotiations, that is, this original lease of 1931?

A. Mr. Thurston, Peter Schmidt and myself.

Q. Now, those gentlemen represented which corporation?

A. Mr. Thurston represented Maltby-Thurston Hotels, Inc., and Mr. Schmidt represented the Pacific Coast Investment Company. I just represented myself.

Q. Had all of these three factors, Maltby-Thurston, Pacific and yourself, engaged in the hotel business in this state and general area?

A. Yes.

Q. But always prior to this time upon a competitive basis, is that right?

A. That is correct. [17]

Q. What was the situation of the Multnomah Hotel in 1931 when you were negotiating to obtain possession of it?

A. You mean the physical condition of it?

Q. Yes, the physical condition and the general operating condition of the hotel.

A. It was, we thought, very much run down, their business was slipping away from them—and, you must remember, this was right in the depression, everything was pointed down—and they were apparently losing money in their operation.

Q. What period of time did you negotiate with the Hauser Securities Company with respect to obtaining possession of the hotel, lease of the hotel?

(Testimony of Frank A. Dupar.)

A. I would say it was between ten months and a year.

Q. Was there a substantial amount of time or negligible amount of time involved in these negotiations?

Mr. White: I would object, your Honor. I think that should be pinned down, it should be explained in better terms.

Q. (By Mr. Henke): Will you explain the negotiations, that is, the time involved and so on?

A. We organized the Western Hotels in, well, I believe it was incorporated in September, September 1, 1930. We had negotiated for several months before that. At about that time, about September 1 or possibly before, we had our first meeting [18] with Mr. Hauser, Eric Hauser came up to Seattle, that started it.

Q. How many times would you say you met, how extensive were the negotiations?

A. It would lag for a few weeks and then it would come to life again. I would say that we made 25 trips down there.

Q. How much time did you personally devote to this negotiation?

A. Well, I went down on every trip. We would sometimes be a couple of days.

Q. Now, when the Multnomah Operating Company was organized, how was the stock of that corporation distributed?

A. Maltby-Thurston Hotels, Inc., took 50 per

(Testimony of Frank A. Dupar.)

cent. Peter Schmidt, as a trustee, I believe, took 25 per cent, and out of the 621½ shares left I had 171½ shares, Mr. Bassett had 15 shares, my brother had 15, and a Mr. Belanger had 15.

Q. Are any of the three parties, you have now last named, still living?

A. No. They have all passed away.

Q. What is the status of the stock which they owned? Is that held by trust or what is its status?

A. My brother's stock is held by the First National Bank as trustee for the estate.

Q. In that same amount as was originally issued?

A. Yes. [19]

Mr. Belanger's stock was sold; I bought a part of it and Mr. Bassett bought a part of it.

Q. So that your holdings of the stock are now—how many shares do you own?

A. Twenty-seven and a half shares.

Q. And the Bassett estate owns, holds how many?

A. The Bassett estate holds 20 shares and the bank holds 15 shares.

Q. The beneficiaries of Harold Dupar's estate are who?

A. One daughter, who still lives.

Q. And the Bassett estate?

A. In the Bassett estate there are the widow and four children and a number of grandchildren, I don't know how many.

Q. And the Belanger estate has no interest now at all?

A. No.

Q. Who was the motivating factor in setting up this payment by Multnomah Operating Company

(Testimony of Frank A. Dupar.)

over and above the rentals payable to the Hauser Securities Company?

Mr. White: Your Honor, before he answers the question, could I ask for some explanation about the phrase "motivating factor," just what the question means?

The Court: No.

You may answer.

I think that is fairly clear.

A. I would say that I was the motivating [20] factor.

Q. (By Mr. Henke): What was the basis of your demand for those payments being made?

A. Can I explain that in detail?

The Court: You are asked to explain it.

The Witness: All right.

A. Maltby-Thurston was a holding company and not an operating company. That is why they negotiated for the lease with the stipulation that it be passed to an operating company. Also Maltby-Thurston was in very serious financial trouble, as good corporations were in 1931.

My position was that I had very little of the stock. I was just a minority stockholder. I had done all the work, I was entitled to something, and I hung out for a lease that would pay me something.

The Court: You had done all what work?

The Witness: Negotiating the, negotiating the lease with the Hausers, which took several months.

Q. (By Mr. Henke): The Multnomah Operat-

(Testimony of Frank A. Dupar.)

ing Company had what actual capital when it started business?

A. A thousand dollars, two hundred shares—yes, that is right.

Q. Was there any deposit agreement of any kind with the Hauser Securities Company to secure the performance of [21] the lease?

A. Yes, there was 750 shares of Maltby-Thurston Hotels, Inc.

Q. And how was that deposited? I mean, what was the arrangement under which it was deposited?

The Court: Isn't that a matter of stipulation?

Mr. Henke: The reason I ask that question is that we have been unable to find a copy of the original agreement with Hauser Securities under which this deposit was made, it apparently has been destroyed.

The Court: All right.

A. It's my recollection that it was as a guarantee for the fulfillment of the lease.

Q. (By Mr. Henke): Would you say that its terms were substantially the same as the terms of the agreement entered as Exhibit Number 4 of February 4, 1944? Would you take a look at that agreement and see if that is substantially as the terms upon the original deposit was made?

The Court: Will you state the exhibit number?

Mr. Henke: Exhibit Number 4, your Honor.

The Court: Very well.

A. Yes, that is my recollection of it. It's the same kind of a paper. [22]

(Testimony of Frank A. Dupar.)

Q. (By Mr. Henke): The only difference being that the original was 750 of preferred, of par value at \$100, and this is 750 common?

A. That is right, but in the meantime Maltby-Thurston went through a financial reorganization, the preferred was wiped out, or it was changed into common, I forget the terms whereby it was converted.

Q. Now, this 30,000—this 750 shares of preferred that was deposited in 1931, where did that come from?

A. Maltby-Thurston issued the stock and it was bought by the Multnomah Operating Company.

Q. With respect to that, did you individually give any guarantees to Maltby-Thurston Hotels, Inc.?

A. Yes.

Q. What was the nature of that agreement? What was the nature of your commitment to Maltby-Thurston Hotels, with respect to the stock?

A. As I remember, I gave them a note for it, but I can't tell you right now. I obligated myself for 25 per cent of that \$7,500—or \$75,000.

Q. Now, that was as a guarantor of the obligation of the Multnomah Operating Company?

A. I guaranteed Maltby-Thurston that they would get par for their stock, for the 25 per cent that I assumed, and then sold it to Multnomah Operating and just took an open account for it. [23]

Q. Did you subsequently pay to Maltby-Thurston Hotels upon account of that guarantee?

(Testimony of Frank A. Dupar.)

A. Yes, I did. I gave them stock and notes.

Q. Can you state whether or not you were ultimately reimbursed with respect to that payment?

A. I was reimbursed by the Multnomah Operating Company. That is right.

Q. In connection with this payment which you received from Multnomah Operating Company, which is the item in dispute here, did you share that with your brother, the Bassett estate, and Mr. Belanger?

A. No, that was mine, that was understood to be mine.

Q. And they made no claims whatsoever with respect to it? A. None whatever.

Q. Were they acquainted with the fact that that payment was being made? A. Oh, yes.

Q. With respect to Multnomah Operating Company as of 1931, what was your then anticipate of the earning prospects of the company?

A. Well, we really didn't expect to get all our lease rent.

Q. Pardon me?

A. I say, we did not expect to get the \$30,000 even, [24] we didn't think it would make that much.

Q. Why was that?

A. Well, as I say, we were in the depression and it was getting worse every day. Our business was going down, our volume was going down. That continued for, well, right into '32.

Q. Well, what was the condition of the property as to its requirements with respect to maintenance?

(Testimony of Frank A. Dupar.)

A. It was in a very dilapidated condition. The lobby was just shameful, I thought. The rooms upstairs were perhaps 250 without baths. The furniture was old, the carpets were old, it needed a great deal of work, great deal of money spent on it.

Q. What was your assumption at that time as to the disposition which would be made of the earnings of Multnomah Operating Company for some years to come?

A. Well, I felt that everything we made would go back into rehabilitating of the building.

Q. What effect did that have upon your insistence upon receiving compensation for services and negotiating the lease?

A. Well, I needed money as bad as anybody at that time. I felt that if I didn't have some kind of a prior claim I would never get anything out of it. Being a very small minority stockholder, I just felt that anything could happen to Maltby-Thurston; they might lose control; it might just get into [25] a position where somebody else would get the corporation or control of it and manipulate it to their own ends.

Q. Did you consider that your services in connection with the negotiation of that lease justified the payment which was required?

A. Yes, I did.

Q. Did you have in mind any questions of the effect taxwise upon Multnomah Operating Company?

A. Taxes were a very small matter in those days.

(Testimony of Frank A. Dupar.)

I don't remember what the tax rate was, but I don't think it was over ten per cent.

Q. Now, you continued to receive those payments until what time? Or have you continued receiving the payments?

A. We are still receiving them, yes.

Q. What occurred in 1944 with regard to the negotiation of an extension of this lease?

A. We had talked several times about extension of the lease. I think perhaps in 1940 we started to talk to them. And they said it was too soon to begin negotiations. But along in 1944, early in 1944, they were receptive to an extension of the lease, they were satisfied with our operation; we were paying them a good rent; but there was quite a bit of uncertainty at that time. Now, this was in 1944. The war was still on. We had, I think every government expert in the country said we were going to have a terrific depression just [26] as soon as the war was over. That seemed to be the feeling throughout the country. The landlord, while he was getting in excess of the minimum rent, insisted on putting the rent up about \$3,000 a month, the minimum. We were quite disturbed, feeling that when the war was over that we might plunge right back into the hard times again.

Q. During the war years, what was the status of the property from the standpoint of maintenance?

A. We were unable to do anything without a priority. I think that is generally known, that you

(Testimony of Frank A. Dupar.)

couldn't do any new work, you couldn't do any repairs except what were absolutely necessary, and then you had to issue a priority for it.

Q. What was the revenue situation of the property during the war years?

A. The revenue was very high, the net revenue.

Q. Why was that?

A. It was because we run almost a hundred per cent full, wages, prices, everything were controlled, but our volume went up. And naturally, we were not able to spend the money we should have in the maintenance of the property, so naturally, we had a very high earning.

Q. Who negotiated the renewal of the lease in 1944? A. Mr. Thurston and myself.

Q. Mr. Thurston being the president of Maltby-Thurston, Inc.? [27] A. That is right.

Q. What was your view as of 1944, at the time this lease was renewed, or extended, as to the future prospects of the property?

A. Well, we felt that we would have to spend a great deal of money on it, that perhaps we would put our earnings in there for a number of years, just put them back into the property. One item was a kitchen which at that time was to cost about \$165,000. Another thing was rehabilitation of the lobby, putting in new dining rooms, refurnishing, redecorating all the rooms upstairs.

The Court: Gentlemen, I would like to know whether or not there has been any effort at all to settle this case, and any talk concerning it?

(Testimony of Frank A. Dupar.)

Mr. White: I haven't been present at any settlement conferences, your Honor. Whether there were any prior to my coming to Seattle, I don't know.

The Court: It's a very strange thing to me if the testimony of Petitioner's other witnesses is going to be the same as that of this witness, even that the issue is as it is between you. It seems to me to be that with a reasonable approach to a situation, the parties could arrive at a settlement easily in this case.

Mr. White: Your Honor, I might add at this time, that I am wondering at the relevance of nine-tenths of Mr. [28] Dupar's testimony.

The Court: I think it's relevant all right, but it's strange to me that, and I will admit that I haven't heard all the testimony, but I have heard the opening statements, it's strange to me that the petitioner takes the position that this is a lease payment and it is somewhat strange to me that the respondent takes the position that it's a corporate dividend payment. I think that there is a clear area in which great profit could be made by both parties in talking settlement in this case.

Mr. Henke: I believe Mr. Scott of Peat, Marwick and Mitchell carried on negotiations for an extended period of time both with the Director's office and with the appellate staff, in an attempt to reach some settlement of this case. I think there has been extensive negotiations in that respect, so far as he is concerned.

(Testimony of Frank A. Dupar.)

The Court: All right, we will proceed with the case, but in view of the fact that there have been some negotiations.

Q. (By Mr. Henke): Mr. Dupar, what are the series, what type of operation does Western Hotels, Inc., engage in?

A. We are a supervision company. We give them, we take care of their books, we look after their statements, we send inspectors around to investigate any discrepancy or any [29] inefficiency. If a hotel falls below certain standards we set, we send a man in to see if he can correct it. We have food experts, we have housekeeping and maintenance experts and so forth.

Q. Western Hotels, Inc., does not operate any properties itself? A. No.

Q. It is purely a management service?

A. Management and supervisory.

Q. Under the terms of this original lease and under the terms of the extension, you were obligated, both Western Hotels, Inc., and Maltby-Thurston Hotels, Inc., to furnish personnel to the Multnomah Hotel? A. That is right.

Q. From your standpoint, did you consider that prejudicial to you in any way with respect to the development of the properties?

A. I don't know as I would—I would figure that was a compliment.

Q. What I meant, under the terms of this extension, would you feel at liberty to employ the services of Western Hotels and the associated com-

(Testimony of Frank A. Dupar.)

panies in the development of other properties in Portland?

A. No. Not without the consent of the Hausers.

Q. Would that be considered a serious concession from [30] your standpoint? A. Yes, it would.

A. Yes, it would.

Q. Will you explain that answer?

A. Eric Hauser, who represented the owners in most of the negotiations, was very particular on the point of who was going to run the hotel. He said as long as the Western, the same personnel as is now in the Western run, own and operate the Multnomah Hotel, he was willing to give us this extension. And I think if we transferred to another corporation that the lease could be validated, or made invalid.

Q. What is the situation at Portland with respect to the possibility of developing additional hotel properties there?

A. There is a man named Corrigan from Dallas who has signed up the merchants around there for a million dollars and has some of the unions to put up two and a half million from their trust funds to build a new hotel, which would just about put the Multnomah out of business.

Q. In 1944, when you made your commitment on the basis of the extended lease, did you feel that you were in any way prejudicing your personal position by continuing the arrangement, that is, that the participants were?

A. We felt that we had, we were signing up

(Testimony of Frank A. Dupar.)

with the Hausers for another 15 years and that we would have to stay with them and not get into negotiations on a new hotel with [31] other people

Q. Would your companies, as such, be interested in developing the new hotel, either with others or on your own account, in Portland? A. No.

Q. In 1944, what were the circumstances under which the agreement was entered into for the payment of this supplemental rental, what negotiations took place with respect to it?

A. Oh, we negotiated with the Hausers several times. They wanted this increased minimum. They feared the end of the war would drop the income down, they felt the same as we did about it, they were just making themselves safe.

Q. What was your position with respect to the supplemental payment, though? What negotiations took place with regard to that, that is, the continuation of the payments?

A. On the lease, on the \$30,000, you mean?

Q. Yes.

A. Well, I felt we were in for some hard times, too, and I felt that if we gave up two and a half years of low, minimum rental, that we were entitled to something for it, we were entitled to gamble on the future.

Q. In other words, the parties receiving the supplemental rental would be——

A. (Interrupting): Would be \$3,000 a month

(Testimony of Frank A. Dupar.)

removed from where they stood at the present time, you see, or stood [32] in 1944.

Q. In other words, if the old lease had run through its entire course, you would have received those two and a half years of payments?

A. That is right.

Q. Then, it was a—with whom was the agreement made, that is, what discussions took place with regard to the continuance of the——

A. (Interrupting): Well, with Eric Hauser.

Q. No, I mean within your—you did not discuss the supplemental rental payment with Eric Hauser, did you? A. Oh, no.

Q. What negotiations took place with regard to that, within your own group?

A. Well, Thurston and myself were the only ones down there and we——

Q. (Interrupting): You mean, when you negotiated with Mr. Hauser? A. Yes.

Q. I am talking now about the supplemental rental payment of the \$30,000 a year. What were the determining factors with regard to the continued extension of that for an extension period?

A. I was all out for getting the payment for the next term of the lease if we had to give up the gamble that we had, [33] that is, if we had to give up our new minimum rent, and the new minimum rent went into effect at once. Does that answer you?

Q. Yes. Well, were there any other factors besides giving up the minimum rental which you were considering then?

(Testimony of Frank A. Dupar.)

A. We had to also agree to the Western Hotel's personnel being in the Multnomah Operating Company. In other words, we had to give up any attempt to go out and join in any promotion of a new hotel.

Mr. Henke: I believe that is all. You may take the witness.

Cross-Examination

By Mr. White:

Q. Mr. Dupar, in 1931 when this lease was negotiated and then assigned to Multnomah, you were then fearing that because of the high maintenance that would be necessary the net profits might be low?

A. Yes, indeed I was.

Q. For the Multnomah? A. Yes.

Q. You also feared that Maltby-Thurston and Pacific Coast Investment Company would wish to retain earnings to take care of rehabilitation or other purposes? A. Yes.

Q. And you wished to guarantee yourself, as a minority, [34] that a certain portion of the net profits from Multnomah would reach you year by year?

A. I wouldn't call it "net profits." I would say that I wanted to get something out of it.

Q. In a sense, you wanted a guaranteed dividend, isn't that correct?

A. No, not a dividend.

Q. You wanted a guaranteed sum of money to come from the corporation to you each year?

(Testimony of Frank A. Dupar.)

A. That is right.

Q. And you were in the typical position of a minority who wants distributions from the corporation and you were up against a typical majority which would prefer to plow back, so to speak?

A. There were several other factors. As I mentioned before, the control of Maltby-Thurston and possibly the Pacific Coast Investment Company might go into other hands.

Q. And that might complicate matters a little more?

A. Yes, sir, they might divert the money to some other place.

Q. And one thing more, they might insist on a more stringent policy of plowing back earnings into Multnomah corporation instead of distributing them? A. They might and they might not.

Q. And so one of the considerations you had in mind [35] was a guaranteed distribution to you of Multnomah's net profit?

A. Well, I am not going to call it "net profit," but I wanted something out of it.

Q. Were you a stockholder of Maltby-Thurston in 1931? A. No, sir.

Q. Did you become a stockholder thereafter?

A. Yes.

Q. When was that?

A. I can't tell you. There were small blocks of stock came on the market in the '30's and I bought some at Mr. Thurston's insistence. He wanted me to go in with him and buy up some stock that was

(Testimony of Frank A. Dupar.)

floating.

Q. When you negotiated for the lease in 1931 from Hauser Securities, or whatever was the name of the——

A. (Interrupting): Hauser Securities.

Q. (Continuing): ——was there bargaining at arm's length?

A. There was, there certainly was.

Q. And Hauser did not lease the hotel to you nor to the lessee, Maltby-Thurston, at any less than what it considered to be a fair rental?

A. No, no, I don't think he did.

Q. Referring to the shares which you held in the petitioner prior to the death of Mr. A. P. Bassett, did you hold any shares jointly with him, was there any joint ownership of shares in the petitioner? [36]

A. In the Multnomah?

Q. I am referring to the sixty-two and a half shares representing one-quarter of the total outstanding.

A. I can't answer that. We bought Mr. Belanger's shares from the Everett Trust and Savings Bank, I believe, who were his executors and we bought them over quite an extended period, and myself and my brother and Mr. Bassett were chipping in a little every month to pay for that. Now, I can't remember the date of it, but it was after 1940, because Belanger died in 1939, this was a year or so after the estate had been settled.

Q. So it was before 1944 that you acquired Mr. Belanger's shares?

(Testimony of Frank A. Dupar.)

A. I think so. So that was only joint ownership I had with him.

Q. Who voted the shares held by either yourself or Mr. Bassett or Mr. Belanger?

A. Well, I voted mine.

Q. Who voted Mr. Bassett's shares?

A. My recollection is that he was at some of the meetings. I guess he voted his own.

Q. Did you ever vote as proxy for either Mr. Bassett—

A. (Interrupting): I have voted as proxy.

Q. Maltby-Thurston Hotels, Inc., when it acquired the lease in 1931, it had no intention of operating the Multnomah Hotel? [37]

A. Oh, no.

Q. It was always intended that the new corporation would be formed, to which this hotel lease would be assigned?

A. Maltby-Thurston was a holding company at that time. At that time it was not against the law to be a holding company. But it did not operate anything.

Q. There was some remark about you having done all the work in the negotiations for this original lease in 1931. To clarify the record, would you state whether you received any assistance or whether there was any other work done on behalf of the leases in 1931, were you the sole negotiator?

A. Oh, no. I think I made it clear, Mr. Thurston, Mr. Schmidt and myself generally went down.

(Testimony of Frank A. Dupar.)

Q. Were the labors approximately equal between you three entities?

A. Oh, I think they were.

Q. What was paid into the petitioner for the shares of stock which were issued in 1931?

A. A thousand dollars, as I remember.

Q. By whom? A. By all of us.

Q. So that a thousand dollars was paid for the total outstanding shares?

A. Of Multnomah Operating?

Q. Yes. [38] A. That is right.

Q. Mr. Dupar, you explained that you insisted on this sum of money being paid to you, which is referred to here as rents. Can you state why a similar sum was paid to Mr. Peter G. Schmidt as trustee and why a sum twice in amount was paid to Maltby-Thurston?

A. Well, I can't say why. I insisted on mine. It was my recollection they decided to take some, too.

Q. How did they determine the proportions? Weren't the proportions determined by stockholdings? A. It was in their case, yes.

Q. When the lease was renewed in 1944, what was the condition of the hotel's maintenance or general repair condition as compared to 1931?

A. We had done a great deal of work in the middle '30's. When we got into the war period it was against the law to do any work. You couldn't do any new work. You could only fix up emergency repairs, like a broken pipe or something like that.

(Testimony of Frank A. Dupar.)

But you couldn't buy a lot of carpet or you couldn't put in new bathrooms or anything of that kind.

Q. Now, the hotel was in substantially better repair or shape, as the word is sometimes used, in 1944 than it was in 1931?

A. Yes, it was, in some places. In some places it was. But I think you will find on the record that the City Health [39] Department said we had to have a new kitchen because things were falling apart.

Q. During the, in the year 1944 and during the war years there were substantial earnings retained which could be expended on repairs, isn't that correct?

A. Not during the war years, you couldn't spend any money on repairs, you just paid taxes with it.

Q. Therefore, there was a substantial amount of cash or liquid assets being retained by the petitioner, Multnomah Operating Company?

A. There was some, yes.

Q. And there was in 1944 and the war years no danger that future earnings would have to be plowed back for repairs and maintenance?

A. Oh, yes, there was.

Q. You just stated that you had substantial earnings being accumulated because they couldn't be expended at that time for repairs or maintenance?

A. That is true. We had a better cash position. We had paid some dividends. We had paid a great deal of taxes. When we talk about repairs, we are

(Testimony of Frank A. Dupar.)

talking—or when we talk about rehabilitation, we are talking about putting in new rooms and things like that, new bathrooms and new kitchens. But when we talk about maintenance, we are talking about carpets and sheets and various things of that [40] kind.

Q. Then, it is correct, Mr. Dupar, that the condition existed in 1931, the danger of plowing back earnings for rehabilitation was not existent in 1944 or the war years, up to about 1946, let's say?

A. Well, it could stand a lot of work on it, all right. We had worn out some of the stuff.

Q. You stated that in 1944 you felt that if you were to give up the minimum rental, which you were then paying to Hauser, that you should be compensated in some way? A. Yes.

Q. How does that explain payment to Maltby-Thurston and Peter G. Schmidt, trustee, as rentals?

A. Well, they were in the same position that I was. Maltby-Thurston was part owner of the lease, the sublease.

Q. And this proportion of thirty thousand was again based on stockholdings, is that correct, Mr. Dupar?

A. On Maltby-Thurston and Pacific Coast Investment, but not on mine.

Q. In 1944, Mr. Dupar, were you associated with any other hotel organizations besides Multnomah and Maltby-Thurston? A. Oh, yes.

Q. Would you state to the Court approximately how many organizations you held the stock in? To

(Testimony of Frank A. Dupar.)

clarify this and simplify this, I am not interested in shares held on the [41] major stock exchanges, which might be held merely for investments, like American Telephone & Telegraph.

A. I would just guess about 15 hotels.

Q. And of how many were you an officer?

A. Oh, eight or ten of them.

Q. And in about how many were you a director?

A. Practically all of them.

Q. Did this condition remain the same throughout the years 1948 and 1949? A. Yes.

The Court: Witness, you are a good witness when you talk, but you let your voice just die right out. I can't hear what you say.

The Witness: Excuse me, I will try to talk louder.

Q. (By Mr. White): How was the amount of \$30,000 determined, Mr. Dupar?

A. I don't remember now.

Q. Well, referring to 1944, how was it determined?

A. It was just a continuation of what we had before.

Q. Was there any bargaining as to what would be a fair so-called super-rental or supplemental rental?

A. Well, sure. We talked it over. We decided that we were entitled to what we had been getting.

Q. Who bargained with Multnomah to determine whether [42] Multnomah should pay a so-called supplemental rental?

(Testimony of Frank A. Dupar.)

A. Well, we talked it over both ways. Of course, we were officers of Multnomah, naturally.

Q. Isn't it true, Mr. Dupar, that you people were talking with yourselves, that Multnomah was owned by you and you were negotiating with yourselves, each of you three individuals held 50 per cent or 25, and you, although you didn't hold entirely 25 per cent, the remaining 25 per cent was held by either you or Mr. Bassett or Mr. Belanger or Mr. Dupar, who was your brother, and there was no arm's length dealing here, you just sat down together and said, "Well, how much are we going to pay, to ourselves"?

A. There was always the possibility we would want to get out of that job down there.

Mr. White: Would you reread the question? I don't think it was answered, your Honor.

The Court: No, it wasn't answered.

The Witness: Well, I don't see how it could be answered very well.

The Court: I was just going to make the same remark the witness did. The question was so complicated and so conditioned that it would be very difficult to make an answer to it.

Mr. White: I will rephrase the question, your Honor. [43]

Q. (By Mr. White): How was it determined that Multnomah, the petitioner, was to pay \$30,000 for the next 15 years? How was the sum of \$30,000 seized upon?

A. \$30,000 was in the old contract. Now, we

(Testimony of Frank A. Dupar.)

were going to extend the contract. We didn't argue about raising it or lowering it. We just extended it.

Q. It was an arbitrary figure, is that correct, Mr. Dupar? A. I don't think so.

Q. If it had been one hundred thousand in the original lease, you might have continued it for a hundred thousand? A. That is right.

Q. It didn't take into account the realities of a present situation, any change in net profit, any change in rentals paid to the original lessor?

A. Yes, it did, and it took into consideration of what would happen in 1945 and '6 when the war was over and we lost our big volume of business.

Q. How did it take that into consideration, Mr. Dupar?

A. Because everybody forecast quite a depression after the war.

Q. What did that have to do with paying \$30,000 to yourself and the remaining two stockholders?

A. We were just extending a lease. We could have [44] raised it, I suppose.

The Court: Well, how did you arrive at \$30,000 the first time you entered into this agreement?

A. I don't know. I don't remember.

Q. How did you arrive at the division of the \$30,000 between you?

A. I held out for 25 per cent of it.

Q. Didn't you divide that \$30,000 on the basis of stockholdings? A. Not exactly, no.

Q. Why not?

A. Because I didn't own 25 per cent of the

(Testimony of Frank A. Dupar.)

you explain why Maltby-Thurston remains as a party to whom 50 per cent of \$30,000 should be paid after 1946?

A. Well, they would remain, they still had the same holdings.

Q. You mean the same stockholdings in Multnomah? [47]

A. Yes. They have always had the same stockholdings.

Mr. White: There are several other matters I think we will cover in a stipulation. If we can't cover those matters in stipulation, the witness may be examined further by the respondent.

The Court: All right.

I think that I am going to take the noon recess at this time until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock p.m.) [48]

The Court: We will proceed with the Multnomah case.

Mr. Henke: We will call Mr. Thurston.

S. W. THURSTON

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name and address, please?

The Witness: S. W. Thurston, New Washington Hotel, Seattle.

Direct Examination

By Mr. Henke:

Q. Where is your residence, Mr. Thurston?

A. Kirkland, Washington.

Q. What is your position with Maltby-Thurston Hotels, Mr. Thurston? A. President.

Q. How long have you been associated with that company?

A. Since it was inaugurated in 1929.

Q. Were you president of that company in 1931?

A. I was.

Q. Are you acquainted with the circumstances in respect to the negotiations of the lease on the Multnomah Hotel in Portland, Oregon?

A. I am, as far as my memory serves me. That is quite a [49] long ways back.

Q. Can you tell me who negotiated that lease for the lessee, that is, the lease of the Multnomah Hotel with the Hauser Securities Company?

A. There was three of us most active in it, Mr. Dupar, Mr. Peter Schmidt and myself.

Q. How long did those negotiations take?

(Testimony of S. W. Thurston.)

A. Oh, from a year to a year and a half, maybe, at least a year.

Q. How extensive were those negotiations? How frequently did you meet with the representatives of the Hauser Securities Company?

A. We must have had between twenty and thirty meetings, I imagine, contacts, all together.

Q. How long did those meetings take?

A. From the matter of half a day to two or three days at a time.

Q. What was the condition of the Multnomah at the time that lease was negotiated in 1931? What was the physical condition of the property at that time?

A. It was very badly run down and needed a great deal of rehabilitation.

Q. How did it stand, from the standpoint of the traveling public, users of hotels?

A. By virtue of the condition of the property, it wasn't [50] sitting well at all.

Q. Do you know whether or not the property was being operated profitably at that time?

A. My recollection is that it was showing a loss of some seven or eight thousand dollars a month.

Q. In the negotiations with the Hausers, did they lay down any conditions as to personnel which was to operate the hotel for the lessee?

A. Very definitely. We had organized Western Hotels, which had some twenty-odd hotels, had contacts all through the northwest, which would serve as feeders into the Multnomah, and which encour-

(Testimony of S. W. Thurston.)

aged us to take it, because we felt that we could change that loss into a possible profit by virtue of our contacts and our ability to operate, and it was the personnel equation that I think governed the deal, as far as Hauser was concerned.

Q. Did the Hausers make any requirements in that respect?

A. They did, very definitely, and I believe it was written in the lease, if I remember right, that the same personnel must be maintained, and the lease was taken by the Maltby-Thurston Company and transferred into an operating company, and in that operating, or in that assignment was a definite condition that we had to maintain the personnel and the contacts.

Q. Aside from the provisions of the lease itself, was there any requirement for the giving of security to the Hauser Securities Company? [51]

A. There was seventy-five, or seven hundred fifty shares of Maltby-Thurston preferred stock, it was put up by a security that was considered at that time to be worth \$75,000.

Q. That was to be forfeited as liquidated damages in the event this lease was not carried out in accordance with these terms?

A. Correct.

Q. Who put that stock up?

A. Maltby-Thurston, half of it, half of it was put up by interests, Frank Dupar, including himself, the chief interested party, or a quarter, I mean, and a quarter by Peter Schmidt and the Pacific

(Testimony of S. W. Thurston.)

Coast Investment Company in their side of the picture.

Q. The stock was actually put up by your company, was it not, and they in effect guaranteed you against any loss, is that right?

A. Dupar interests and the Schmidt Maltby-Thurston Company against loss of the quarter interest each that they had.

Q. Did they later make good on that guarantee?

A. They did. It was paid.

Q. Then, subsequent to that time all the parties were reimbursed by Multnomah Operating Company? A. Correct.

Q. Reference has been made to a supplemental payment which was made by Multnomah Operating Company. Can you tell us [52] the circumstances under which that supplemental payment was negotiated in 1931?

A. At the time we took the property it was a highly speculative venture and it was recognized that we would have to spend a great deal of money for rehabilitation and it would be a question of possibly a number of years before any earnings might be obtained from the property, the interested parties took the stand that they would not go into the deal unless there was some assurance of getting some return on it, so that—before all of the money was spent for rehabilitation, and we hit upon the idea of a sublease, or I don't know what you might call it, a sandwich lease or something, to come in between there, so that it would be considered the

(Testimony of S. W. Thurston.)

same as additional rental that had to be paid, and it would have a priority there, or a reasonable priority, at least, so that they would be reasonably assured of something coming out of it before all of the money was spent for the rehabilitation.

Q. Was any particular member of the parties involved particularly anxious that that be done?

A. Yes, very definitely. Mr. Dupar was in there personally and spent a great deal of time in handling the negotiations and recognized the speculation in the deal, and unless there was something along that line done there was no deal.

Q. And, as a result of subsequent negotiations, you agreed upon the formula for the supplemental rental payment, is [53] that correct?

A. Correct.

Q. That was between yourself, Mr. Dupar and Peter G. Schmidt and his brother Adolph, is that right?

A. That is right, his brother Adolph and other members of that family.

Q. Can you state whether or not that payment represented a fair compensation for the services and liability and responsibility which was involved?

A. We felt it did at that time.

Mr. White: That is calling for some opinion here. It ought to be preceded by some detail as to how this witness is qualified to answer that, I think. I have allowed testimony already as to opinion of value, shares of stock valued at \$75,000, but I don't

(Testimony of S. W. Thurston.)

think I can let this go without objection, your Honor.

The Court: I will overrule the objection, he is party to the agreement and party to the negotiations, he is in a position to give an opinion.

You may answer.

A. We felt that it did. We recalled all of the work we had done in it, the speculation that was involved and the work that was staring us in the face in order to make it a successful enterprise; therefore, we felt it was a fair deal. [54]

Q. (By Mr. Henke): Referring to the years immediately preceding the year 1944, what was the situation with respect to the lease and your negotiations with the Hauser Security Company?

A. At that time, or, as a matter of fact, two years prior to that, or five years prior to the expiration of the 1931 lease, we started negotiations for a renewal of the present lease because we had to build a new banquet room into the hotel, we had to renew practically all of our kitchen equipment, and ventilation and one thing and another at a total of some four hundred thousand dollars, in order to support what we felt was the type of a hotel that would keep a new hotel out of Portland. There was a new hotel being threatened, and is today, as a matter of fact, but at the time it was very acute and, unless we could enlarge our banquet rooms and put in a better type of facilities in there, we would have possibly had the new hotel in the next year or two, so we started those negotiations two and a

(Testimony of S. W. Thurston.)

half, or about five years before that. They felt it was too early. We finally wound them up, I think, about two and a half years, between that and three years, before the lease expired.

Q. You negotiated a new extension agreement?

A. And we negotiated this new extension. And they raised our minimum rental and we got together on what we felt was a fair deal from then on and we proceeded to raise the money to put in the improvements and have carried on along the same lines ever since. [55]

Q. In connection with the extension of the lease, there was an extension agreement for the extension of the supplemental payments?

A. Yes, we felt that had been carried on without any contest from anybody and we felt that the work that was ahead of us then, they were just as much entitled to the consideration as they had been in the past, and so we just didn't raise the question any further or go into any discussion as to any modification of it.

The Court: Can you gentlemen here hear the witness?

Mr. Henke: Yes.

The Court: You appear like you can. I can't hear him when he lets his voice go down.

Mr. White: Could the question be reread?

Q. (By Mr. Henke): During the extension period, were you permitted to maintain the same personnel in the Multnomah Operating Company as was required under the original lease?

(Testimony of S. W. Thurston.)

A. That carried on through the extension automatically, as I understand, as I remember.

Q. And that involved having available the management of Maltby-Thurston Hotels, Inc., and Western Hotels, Inc.?

A. Correct.

Q. Now, you made some mention of the possibility of other hotel properties coming into Portland. Did this agreement with [56] the Hausers in effect foreclose your companies from participating in such ventures?

A. It automatically did that, because we did not want to promote a competitive hotel after having made this major investment in the Multnomah that we did.

Mr. White: Could I ask that be reread?

(Question read.)

Mr. Henke: You may take the witness.

Cross-Examination

By Mr. White:

Q. Mr. Thurston, referring to the thirty thousand dollars in question, isn't it true that it was not a rental?

A. It was not what?

Q. It was not a rental?

A. It was not a rental?

Q. That is correct.

A. I don't know how you would construe it. It was a lease between the Multnomah Operating Company that required that payment. I don't know

(Testimony of S. W. Thurston.)

how you would refer to it unless it would be as a rental.

The Court: Of course, that is a legal conclusion, at any rate.

Mr. White: Very well, your Honor.

Q. (By Mr. White): Mr. Thurston, how many corporations were you associated [57] with in 1944, approximately?

A. How many corporations? Oh, about twenty.

Q. Were you associated with them as a stockholder, how many were you associated with? And I am not referring to a publicly held corporation in which you may hold just as an investment.

A. I have very few stock interests outside of the hotel companies we are interested in.

Q. I am not interested in your General Motors or anything like that, but the corporations in which you have a substantial interest and you are interested in them more than as a receiver of dividends, or something of that sort, your hotel corporations particularly.

A. Probably four or five is all I have an interest in. The Maltby-Thurston Company is my chief interest.

Q. Were you an officer in these companies?

A. Yes, I am an officer in two other companies.

Q. In how many?

A. Two other companies.

Q. In how many are you a director?

A. Fifteen or twenty.

Q. Did this condition remain the same in 1948

(Testimony of S. W. Thurston.)

and 1949? A. About that, yes.

Q. Was this thirty thousand dollars which is in question here paid every year, commencing with the year 1931 or 1932? [58]

A. My recollection is that it was not paid fully in 1932, it was probably partly paid. I can't recall, times were pretty tough, but it has been paid regularly, I think, ever since, and I think most of it was paid also in the first two or three years. There may have been a few months there. But they were quite insistent that money be coming forth, be forthcoming promptly, and it was.

Q. Was there a net profit earned by the petitioner, Multnomah, every year, commencing with its year of incorporation, which was in '31?

A. I don't believe we paid any dividends for four or five years, of the Multnomah.

Mr. Henke: That wasn't the question.

Will you read the question back?

The Court: You mean the question and answer?

Mr. Henke: I don't think I got the question.

(Question read.)

A. I believe there was a net profit, but it was all spent in the rehabilitation of the properties. I don't think any of the stockholders got any dividends outside of this lease rent for a number of years.

Q. (By Mr. White): Mr. Thurston, how was the thirty thousand dollars determined in 1931?

A. Well, I just can't recall the detail of it,

(Testimony of S. W. Thurston.)

excepting [59] the meeting of all of the interested parties, where we discussed the pros and cons of it, and finally arrived at this figure, providing it was earned, it was recognized, it was highly speculative, that is how it happened, I believe.

Q. Who were the interested parties?

A. There was Mr. Dupar, Mr. Schmidt, several of Mr. Schmidt's associates, and I believe some of Mr. Dupar's associates, who had some minority interest with him, together with myself, and my many, and the associates.

Q. Isn't it correct that the fifty per cent paid to Maltby-Thurston Hotels, Incorporated, and the twenty-five per cent paid to Peter Schmidt as trustee, were based on stockholdings in the petitioner?

A. I don't recall having any agreement to that effect and I don't know that it was to that effect. I believe that it was predicated a great deal upon the services rendered. I know Mr. Dupar and myself and Mr. Schmidt in person rendered a great deal of services in these cases.

Q. Is it contended that the fifty per cent paid to Maltby-Thurston and the twenty-five per cent paid to Peter Schmidt, trustee, was coincidentally proportionate to the stockholdings of those two in the petitioner?

A. Well, I won't argue that with you. The facts are there to show for themselves.

Q. Mr. Thurston, was compensation paid by the

(Testimony of S. W. Thurston.)

petitioner [60] to Mr. Dupar, Mr. Frank Dupar, in 1944, for his services rendered to that corporation?

A. You mean aside from the lease rental?

Q. That is right, sir.

A. I believe there is, there is some salary that was involved.

Q. Do you recall what that was?

A. Three hundred seventy-five dollars a month, I believe.

Q. Was compensation paid to yourself by the petitioner in 1944 as an officer of that corporation?

A. Yes.

Q. Do you recall what that was?

A. Eight hundred fifty dollars a month is my recollection.

Q. Was compensation paid to Mr. F. M. Kenny as an officer of that corporation in 1944?

A. I cannot recall.

Q. Were there other officers of the petitioner, Multnomah Operating Company, in 1944?

A. Were there other officers, did you say?

Q. That is right.

A. I believe Mr. Kenny was the vice president or a director, I do not recall just which.

Q. Do you know if all officers were paid compensation in 1944 by the petitioner?

A. No, I don't believe there were all officers paid. I [61] believe that Mr. Dupar and myself were paid.

Q. Did you and Mr. Dupar, did either of you

(Testimony of S. W. Thurston.)

work full time for the petitioner, Multnomah Operating Company?

A. We don't work full time for any of them excepting when we are called upon and have work to be done, why, then we work night and day.

Q. Is it not true, then, that you did not render any more services for the petitioner in 1944 than you did for any of your other corporations, your hotel corporations?

A. It depends upon what work had to be done, going through that negotiation of the extension of the lease, going through the additional remodeling and so forth, we put in a great deal of time there.

Q. Does that answer apply to both yourself and Mr. Dupar? A. It does.

Q. Mr. Thurston, there is some question at the present whether the parties, that is, Mr. Henke and myself, will have a certain document, which is the Western Hotel's Agreement with Multnomah for services rendered. A. Yes.

Q. So, in view of the fact that it may not be available, could you tell us what the nature of this agreement was, the year in which it was entered into, and how much money was paid to Western Hotels pursuant to this agreement?

A. My recollection is that Western Hotels started in there [62] at five hundred dollars a month, which lasted for a year or two maybe, or something like that, was subsequently raised to one thousand dollars a month, and now carries about one per cent of the gross receipts, which is con-

(Testimony of S. W. Thurston.)

sistent with other properties that are being handled, and that amounts to possibly a little more than one per cent, or a thousand dollars a month.

Q. When did the percentage basis begin, what year? A. I think it was just last year.

Q. When did the one thousand dollars begin, which year? A. I can't recall.

Q. Was it before or after——

A. Oh, it was seven or eight years ago, something like that, it may be longer.

Q. Do you know if it was before or after 1944?

A. I can't recall.

Q. Do you know if it was——

A. The records are available for it.

Q. Just, we don't want to bother you too much, but we are not sure we will have the records in time, so this will be a quick way. When was this agreement first entered into?

A. Just about the time we took over the property for Western, because it was the property of Western and Maltby-Thurston that had to operate, and the agreement was then entered into.

Q. Would you explain, to make sure we understand, what [63] the nature of this agreement was? What was Western Hotels to do?

A. It was to handle, it was to supervise the operation of the property, it was to give the benefit of purchases, we buy in volumes and so forth, by virtue of the number of hotels we had, it got the benefit of all that purchase advantage that we had, it had the forwarding business from all of the vari-

(Testimony of S. W. Thurston.)

ous communities that we were interested in, that business was forwarded into the Multnomah, by virtue of our contact in Portland, and the advantages of selecting personnel is quite an advantage because we had such a big organization that we could supply personnel to a much better advantage than an individual operator, and all of the various advantages of that nature, that Western had to supply.

Q. In your negotiations with Mr. Dupar with reference to the Multnomah Operating Company, did Mr. Dupar insist that he would be recompensed in some way, that he would obtain a portion of the profits each year?

A. Correct, before all of the money was spent for rehabilitation, I distinctly remember that was his concern, he knew that we were taking these properties as a rule and spending everything it earned for rehabilitation and therefore the stockholder was possibly out indefinitely and that was one of the chief reasons for this sublease.

Q. Were you a stockholder in Western Hotels, Mr. Thurston? [64]

A. Maltby-Thurston Hotels is a stockholder in Western Hotels. I am not a stockholder. I am an officer of them.

Q. You are an officer in both corporations?

A. Correct.

Q. As such an officer, did you feel that Western Hotels was being adequately compensated for the

(Testimony of S. W. Thurston.)

services rendered during the year 1944 and the years thereafter?

A. Well, it possibly could be a question, but it was all kind of in the family group and we never raised the question of detail, whether it was exact to the cent or not.

Mr. White: That is all I have.

No further questions, your Honor.

The Court: Any redirect?

Mr. Henke: No, your Honor. I believe that is all.

The Court: You may step down.

(Witness excused.) [65]

Mr. Henke: We had one more witness, Mr. Peter G. Schmidt. Mr. Schmidt, however, was scheduled to arrive here from New York tonight by plane, we are contemplating that he would be able to testify tomorrow morning. However, I believe his testimony would be largely a repetition of the testimony of Mr. Thurston. I don't know whether counsel particularly desires his testimony or not.

Mr. White: We had Mr. Schmidt under subpoena, but we won't insist upon his appearance. We are satisfied with the testimony presented so far.

Mr. Henke: Then, the only other matter we would have, your Honor, is the question of completing these items of information which counsel desired to have put into the record.

The Court: Are you able to do that now?

Mr. White: Your Honor, what I would suggest is that we could hold the record open so as to be able to submit that stipulation.

The Court: Yes. The only difficulty with that is that when I hold a—is that when I hold a record open I like to designate exactly for what purpose.

Mr. White: Just to stipulate certain matters as to stockholdings. I could go over it in some detail, I have a rough draft of the stipulation, but I think it might take a little time. Perhaps to preserve the rights [66] of both parties, I ought to go down the line, it will take about five minutes to read or——

The Court: You list what you expect to stipulate.

Mr. White: Before I do that, I would like to list the 1948 and 1949 returns of the petitioners.

Mr. Henke: We have no objection to either return being filed.

Mr. White: I list the 1948 return as Respondent's Exhibit A, your Honor.

The Clerk: Exhibit A.

(Respondent's Exhibit A was marked for identification.)

The Court: It will be received.

(Respondent's Exhibit A was received in evidence.)

Mr. White: Respondent introduces the 1949 return of the petitioner as Exhibit B.

(Respondent's Exhibit B was marked for identification.)

The Court: It may be received.

The Clerk: Exhibit B.

(Respondent's Exhibit B was received in evidence.)

The Court: You may now proceed.

Mr. White: The parties plan to stipulate and it [67] is anticipated they will stipulate the total stock outstanding of Maltby-Thurston Hotels, Incorporated, and show the percentage of shares held at the date of the incorporation of the petitioner, the date of the assignment of the lease in question, which occurred in 1931, at the date of the renewal of this lease in 1944, and during the years 1948 and 1949.

Mr. Henke: In regard to that first item, Mr. White, since this corporation was incorporated in 1931——

Mr. White: The date of incorporation will be satisfactory.

Mr. Henke: The date of incorporation will be satisfactory for both those items.

Mr. White: Very well.

The Court: So understood.

Mr. White: In so doing, we are not stating we ask the petitioner to submit the percentage held by every single stockholder but the percentage held by the major stockholders.

The Court: He could want to do the same with the total stock held by Western Hotels, Incorporated, at these particular dates.

Mr. Henke: I believe you have the testimony of

Mr. Dupar that there has never been any change in the stock, that the stockholdings have been continuously identical. [68]

The Court: If so, it could be simply stipulated that the stockholdings are as such and have never been changed.

Mr. White: We would want the stipulation as to the total outstanding stock of the Pacific Coast Investment Company, showing the total outstanding and the percentage held at the critical dates by the major stockholders.

The next stipulation will be the 30,560 shares of Maltby-Thurston Hotels, Incorporated, which is held in a voting trust. We would like to show who the trustee was, who held the shares of stock which we will list as follows: 1,703 shares, 2,573 shares, 5,510 shares and 2,000 shares, and 7,022 $\frac{3}{4}$ shares. We would like to have the name of the individual who holds those shares and we would like to know whether he holds any capacity as stockholder, director, officer or employee in either Maltby-Thurston Hotels, Incorporated, the petitioner; Western Hotels, Incorporated, or Pacific Coast Investment Company.

Mr. Henke: In regard to that item, your Honor, we are agreeable to furnishing the information. However, I am advised by the auditor that the figures quoted are erroneous.

Mr. White: We will submit the correct figures. What I am interested in is the amount of shares held by Mr. Frank A. Dupar, the amount held by

the T. E. Himmelman, Mr. H. E. Maltby, Mr. T. W. Metzdorf, and Mr. S. W. Thurston. [69]

The next paragraph, your Honor, I propose to stipulate that no consideration was paid by Maltby-Thurston Hotels, Incorporated, for the lease referred to in this proceeding as Exhibit 1, except the consideration stated therein.

The following stipulation would be the rentals paid to Hauser Securities Company by the petitioner since the period of time when the lease was entered into.

Mr. Henke: I am confused as to this——

Mr. White: We have been trying to establish 14, which I read as being no consideration paid by Maltby-Thurston to the lessor other than was stated in the lease. I want to establish whether or not any bonus or sum of money or consideration moved from Maltby-Thurston, the lessor, in addition to what is set forth in the lease agreement. Sometimes there are such things as a bonus payment, as you know——

Mr. Henke: The witnesses have already testified that there were 750 shares of preferred stock of Multnomah which was deposited as collateral.

Mr. White: I see.

Mr. Henke: So I would assume that that was necessarily at least a consideration to the Hauser Securities.

Mr. White: Then my stipulation will go to the matter of that 75,000 shares plus what is set forth in the lease, was there anything in addition paid to the lessor, Hauser Securities. [70]

The Reporter: You said "75,000 shares," Mr. White.

Mr. Henke: Seven hundred fifty shares, seventy-five thousand par value there.

Mr. White: I would like to have a stipulation as to the officers of Maltby-Thurston Hotels, Incorporated, during the period of 1944 to 1949 and the compensation paid to them by the corporation.

I would like to stipulate who are the directors of Maltby-Thurston Hotels, Incorporated, during the period 1944 through 1949.

I would like to stipulate who were the officers and directors of the petitioner during that same period 1948 through 1949 and also in the year 1931 when it was incorporated.

We would like to stipulate who were the officers and directors of Western Hotels, Incorporated, during the period 1944 through 1949.

We would like to stipulate who were the officers and directors of the Pacific Coast Investment Company during the period 1944 through 1949.

That is all, your Honor.

Mr. Henke: There is one additional matter which—pardon me.

The Court: Well, so far I note that it at least in one respect requests, a request is made for a stipulation to [71] a conclusion rather than a fact. It is fine with me if parties can stipulate to conclusions, and the conclusion I am referring to is the matter of consideration referred to.

Mr. White: I would like to clarify that, your Honor. What I was trying to determine was

whether the Maltby-Thurston Hotels, Incorporated, paid any bonus, as it is sometimes called, to the——

The Court (Interrupting): Yes, I understood your position all right. I will make an order that the parties stipulate to the matters just indicated, insofar as they may, with respect—well, absolutely with respect—to the facts insofar as they may with respect to the conclusions that he referred to, and I will hold the record open. How long do you think it would take you to get this together?

Mr. Henke: Mr. Weston, how long do you think it would take to gather that material?

Mr. Weston: Possibly next Wednesday.

The Court: I will hold the record open for 30 days for receipt of written stipulations in Washington.

Now, as I understand the situation at the present time, the petitioner has rested?

Mr. Henke: We have one more, just one item that I did want to put in the record before resting, and that is the minutes of the meeting, first meeting of the board of directors of Multnomah Operating Company as of June 30, 1931, which [72] sets forth the provisions with respect to this supplemental payment. I think you read these. Is that agreeable?

Mr. White: I haven't, but it is all right.

The Court: Is there any objection?

Mr. White: No objection, your Honor.

The Court: I assume you wish to substitute copies?

Mr. Henke: Yes, your Honor.

The Court: All right, the exhibit will be received and permission is granted to substitute a copy.

Mr. White: I think you gave a blanket order which would cover my—respondent's—exhibits?

The Court: Yes, I did, I gave a blanket order.

The Clerk: This will be Exhibit 6.

(Petitioner's Exhibit No. 6 was marked for identification and received in evidence.)

PETITIONER'S EXHIBIT No. 6

First Meeting of Board of Directors of Multnomah Operating Company

The first meeting of the Board of Directors of the Multnomah Operating Company was held at 617 Corbett Building, Portland, Oregon, on June 30, 1931, at the hour of 4:30 p.m., there being present directors, S. W. Thurston, Eric V. Hauser, and John R. Latourette, all of whom had qualified as directors by taking the oath of office as required by law.

Upon motion duly made, seconded and unanimously adopted, director Thurston was chosen chairman of the meeting.

The chairman announced that the board proceed with the election of officers, whereupon the following proceedings were had:

S. W. Thurston was unanimously elected to the office of President of the corporation.

Petitioner's Exhibit No. 6—(Continued)

Eric V. Hauser was unanimously elected to the office of Vice President of the corporation.

Frank A. Dupar was unanimously elected to the office of Secretary of the corporation.

Peter G. Schmidt was unanimously elected to the office of Treasurer of the corporation.

H. E. Maltby was unanimously elected to the office as Assistant Secretary.

A proposed seal was submitted, an imprint of which follows, and upon motion duly made, seconded and adopted said proposed seal was unanimously adopted as the seal of the corporation.

The following resolution was proposed, seconded and unanimously adopted, to wit:

“Resolved, That the United States National Bank of Portland, Oregon, and the First National Bank of Portland, Oregon, be the depositaries for the funds of the corporation.”

The following resolution was proposed, seconded and unanimously adopted, to wit:

“Resolved, that checks on the company's bankers shall be signed by either of the following named officers, to wit: S. W. Thurston, President; Frank A. Dupar, Secretary; Peter G. Schmidt, Treasurer, or H. E. Maltby, Assistant Secretary.

“Be It Further Resolved, that in addition to the above-named officers, checks on the United States National Bank of Portland, Oregon, may be signed by Earl McInnes, Resident Manager.

Petitioner's Exhibit No. 6—(Continued)

“Be It Further Resolved, that said Resident Manager is hereby authorized to endorse all checks, drafts, and orders payable to or belonging to this corporation for deposit only.”

The following resolution was proposed, seconded and unanimously adopted, to wit:

“Resolved, that the price of the non-par stock of the corporation be fixed at \$4.00 per share, and upon payment of such price by the subscribers thereto the said stock to be issued fully paid.”

The President submitted to the board a proposal from Maltby-Thurston Hotels, Inc., offering to transfer to the corporation the lease upon the Multnomah Hotel, as follows:

“Portland, Oregon, June 30th, 1931.

Multnomah Operating Company,
An Oregon Corporation,
Portland, Oregon.

The undersigned, Maltby-Thurston Hotels, Inc., has carried on for a period of over six months negotiations with the Hauser Securities Company for a lease on the Multnomah Hotel property in Portland, Oregon, which negotiations necessitated the exercise of much knowledge and skill and the expenditure of a considerable amount of time and money. As a result thereof, on the day of June, 1931, a lease of said hotel property was entered into between the Hauser Securities Company,

Petitioner's Exhibit No. 6—(Continued)
the lessor, and Maltby-Thurston Hotels, Inc., the lessee, an original copy of which lease accompanies this offer.

As collateral security for the faithful performance of the terms of said lease Maltby-Thurston Hotels, Inc., deposited with the lessor its preferred stock at the par value of \$75,000.00, in accordance with the terms of a copy of said collateral agreement herewith submitted.

The Maltby-Thurston Hotels, Inc., now offers to transfer and assign all its right, title and interest in and to said lease to the Multnomah Operating Co., an Oregon corporation, upon the following terms and conditions and for the following considerations:

(1) The Multnomah Operating Company shall pay the sum of \$2500.00 per month for each and every month during the full term of said lease, such monthly payments to be made to the following named in the following proportions, to wit:

Maltby-Thurston Hotels, Inc.	\$1250.00
Peter G. Schmidt, Trustee	625.00
Frank A. Dupar	625.00

(2) The Multnomah Operating Company shall purchase on open account the preferred stock deposited as collateral security for said lease for the sum of \$75,000.00, the par value thereof.

(3) The Multnomah Operating Co. shall accept said assignment and agree to be bound by and to

Petitioner's Exhibit No. 6—(Continued)
fully perform all the terms, covenants and conditions of said lease and consent to said assignment.

(4) Before said assignment shall become effective, it must receive the written consent of the Hauser Securities Company, in accordance with the terms of said lease.

MALTBY-THURSTON
HOTELS, INC.;

By S. W. THURSTON,
President."

Whereupon, the following resolution was proposed, seconded and unanimously adopted, to wit:

"Whereas, Maltby - Thurston Hotels, Inc., has offered to transfer and assign to the corporation that certain lease on the Multnomah Hotel, in accordance with the terms of that written offer on file with the corporation and made a part of the minutes hereof, and

Whereas, the Board finds that said offer is a fair and reasonable offer and should be accepted in the interests of the Multnomah Operating Company, Now, Therefore,

Be It Resolved, that the offer of Maltby-Thurston Hotels, Inc., be and the same is hereby accepted, and the officers of this corporation hereby are authorized to accept the transfer of said lease in accordance with the terms of said offer, and to do and perform all acts and things on behalf of this

Petitioner's Exhibit No. 6—(Continued)

corporation necessary or proper to complete said transfer and observance of all the terms of said offer.”

The following resolution was proposed, seconded and unanimously adopted, to wit:

“Whereas, S. W. Thurston, President; Frank A. Dupar, Secretary, and Peter G. Schmidt, Treasurer, will be required to give much of their time to the affairs of the corporation, and

Whereas, the success of the business is mainly dependent upon the services performed and to be performed by the above-named officers, Now, Therefore,

Be It Resolved, that the monthly salaries of the above-named officers be fixed in the amounts set opposite their respective names, to wit:

S. W. Thurston, President	\$750.00
Peter G. Schmidt, Treasurer.....	375.00
Frank A. Dupar, Secretary.....	375.00”

The president requested John R. Latourette, attorney for the company, to prepare a set of bylaws, to be submitted to the board at an early date.

There being no further business to come before the meeting, upon motion the meeting adjourned.

/s/ S. W. THURSTON,
President;

/s/ FRANK A. DUPAR,
Secretary;

Petitioner's Exhibit No. 6—(Continued)

JOHN LATOURETTE,
Secretary of Meeting;

/s/ ERIC O. HAUSER, JR.,
Director.

Admitted in evidence June 17, 1955.

Mr. Henke: With that, petitioner will rest, your Honor.

Mr. White: Respondent rests.

Filed July 1, 1955, T.C.U.S. [73]

[Title of Tax Court and Cause.]

Certificate

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 18, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review," and the "Designation of Additional Portions of Record," including petitioner's Exhibits 1 through 6, admitted in evidence, and respondent's Exhibits A and B, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the respondent in the Tax Court has

initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of November, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15370. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Multnomah Operating Company, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed November 27, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.